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83-1215

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

No. _____

STATE OF SOUTH CAROLINA, et al.,

Petitioners,

v.

JOHN R. BLOCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPENDICES

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1426
No. 83-1511

State of South Carolina ex rel Leslie E. Tindal, Commissioner of Agriculture; Steven W. Hamm, as South Carolina Consumer Advocate; South Carolina Farm Bureau; Frank Flowers; W. Charles McGinnis; Lawrence Weathers; Suncoast Milk Producers Cooperative; Independent Dairy Farmers Association, Inc.; Tampa Independent Dairy Farmers' Association, Inc.; Upper Florida Milk Producers Association; Georgia Milk Producers, Inc.; Coble Dairy Products Cooperative, Inc.; Inter-State Milk Producers Cooperative; Dairymen, Inc.; Associated Milk Producers, Inc.,

Appellees,

v.

John R. Block, Secretary of the United States Depart-

ment of Agriculture, United States Department of Agriculture and Commodity Credit Corporation,

Appellants.

State of Minnesota,

Amicus Curiae.

Pennsylvania Farmers Union,

Amicus Curiae.

Dairy Farmer Distributors of America and Gustafson,

Amicus Curiae.

State of New York and Upstate Milk Cooperatives, Inc.

Amicus Curiae.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Matthew J. Perry, District Judge.

Argued: July 12, 1983
Decided: September 9, 1983

Before PHILLIPS, SPROUSE and ERVIN, Circuit Judges.

Douglas Letter (Leonard Schaitman, Nicholas Zeppos, Sarah Greenberg, Appellate Staff, Civil Division, Dept. of Justice; J. Paul McGrath, Assistant Attorney General; Henry Dargan McMaster, United States Attorney on brief) for Appellants; Morgan Hollander (D. Paul Alagia, Jr., Richard A. Gladstone, Sydney J. Butler, Paul S. Davidson, Barnett & Alagia; Donald M. Barnes, Salvatore A. Romano, Joyce L. Bartoo, Arent, Fox, Kintner, Plotkin & Kahn; T. Travis Medlock, Attorney General, Clifford O. Koon, Jr., Assistant Attorney General; Russell H. Putnam, Jr.; Russell W. Templeton; Hubert E. Long, Long Boukniqht, Nicholson & Davis; Venable Vermont on brief) for Appellees; (Hubert H. Humphrey, III, Attorney General, Jon K. Murphy, Special Assistant Attorney General, Catharine F. Haukendahl, Special Assistant Attorney General on brief) for Amicus Curiae.

SPROUSE, Circuit Judge:

John R. Block, the Secretary of the United States Department of Agriculture

(the Secretary), appeals from the judgment of the district court enjoining him from implementing his decision to impose a 50-cent deduction on the proceeds of all milk sold commercially. The Secretary officially announced his decision by issuing a "notice of determination," which incorporated, among other things, regulations for implementing the decision.[1/] This action was taken pursu-

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1/ 48 Fed. Reg. 11,253 (March 17, 1983). The deduction applies to the proceeds of milk sold during the period April 16, 1983, through September 30, 1983. Id. Collection procedures are set forth in the "final rule" published on November 30, 1983. 7 C.F.R. § 1430.291 et seq. (1983). The party responsible for collecting the deduction may be the milk producer or purchaser, depending on the circumstances. To the extent a producer markets his own milk directly to consumers, he is responsible to remit to the Commodity Credit Corporation (CCC) 50 cents per hundredweight of milk sold. To the extent a producer sells his milk to nonconsumers, the purchaser is responsible to deduct 50 cents per hundred-

FOOTNOTE CONT'D ON NEXT PAGE

ant to a recent congressional amendment to section 201 of the Agriculture Act of 1949,[2] which generally established the present structure of the milk price support program. The purposes of the deduction, as described by both Congress and the Secretary, are to encourage dairy farmers to reduce milk production and to offset a portion of the cost of the milk price support program.[3] The Secretary is not required by law to impose the deduction, but is authorized by Congress to take that action in his discretion if he believes it will encourage a reduction

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FOOTNOTE CONT'D FROM PREVIOUS PAGE weight of milk bought from the producer proceeds and remit the collections to the CCC. 7 U.S.C. § 1446(d)(4); 7 C.F.R. § 1430.295 (1983).

2/ Pub. L. No. 97-253, § 101, 96 Stat. 763 (Sept. 8, 1982) (amending 7 U.S.C. § 1446).

3/ See 7 U.S.C. § 1446(d)(2); 48 Fed. Reg. 3764, 3766 (Jan. 27, 1983); see also note 9 infra.

in milk production. It is conceded that the deduction will reduce the gross income of farmers by approximately 4 percent.4/

The State of South Carolina, several dairy farmers and a number of intervening

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4/ 7 U.S.C. § 1446(d)(2). Congress first provided in the amendment that the Secretary shall support the price of milk at not less than $13.10 per hundredweight, allowing the Secretary to increase that level in his discretion Id. § 1446(d)(1). The Secretary has set the price support level for the fiscal year October 1, 1982, through September 30, 1983, at the statutory minimum. 47 Fed. Reg. 42,128 (Sept. 24, 1982). The amendment further gave the Secretary discretion to impose two 50-cent deductions if CCC purchases of surplus milk products were projected to exceed certain levels. 7 U.S.C. § 144 6(d)(2), (3). The Secretary estimated that a 50-cent per hundredweight deduction represented about 4 percent of a farmer's gross income. 48 Fed. Reg. 3764, 3765 (Jan. 27, 1983). By imposing both deductions, the Secretary would reduce a farmer's income by about 8 percent. Id. The Secretary to date has imposed only one of the 50-cent deductions, which is the deduction challenged in this litigation.

agricultural groups (hereinafter collectively referred to as "dairy parties") filed this suit in district court alleging administrative law and constitutional violations, and seeking injunctive relief preventing implementation of the deduction program. Following an evidentiary hearing, the court found that the Secretary had violated the Administrative Procedure Act (APA) in its rulemaking proceedings.5/ It then issued a pre-

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5/ South Carolina v. Block, C/A No. 82-3172-0 (D.S.C. June 3, 1983) (Block II). The court, having found administrative law violations, did not address the constitutional claims.

District courts in several other circuits recently considered some of the same issues before the district court, and all refused to issue injunctions. Pennsylvania Farmers Union, Inc. v. Block, C/A No. 83-0476 (M.D. Pa. April 28, 1983); National Farmers' Organization, Inc. v. Block, 561 F. Supp. 1201 (E.D. Wis. 1983); Mulroy v. Block, C/A No. 82-CV-1191 (N.D.N.Y. May 5, 1983);

FOOTNOTE CONT'D ON NEXT PAGE

liminary injunction on June 3, 1983, enjoining further collections of the deduction and ordering the return of all monies collected pursuant to the regulation.6/ We hold that the Secretary complied with the APA and that the legislation granting him discretion to act does not violate any provision of the Constitution, and vacate the district court's order.

I.

Congress, in section 201 of the Agriculture Act, authorizes and directs

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FOOTNOTE CONT'D FROM PREVIOUS PAGE Larsen v. Block, C/A No. NC-82-0222W (D. Utah March 28, 1983); Haworth v. Block, C/A No. 82-4187 (D. Idaho March 5, 1983).

6/ The order was stayed by this court on June 13, 1983, pending appeal, and Chief Justice Burger, on June 27, 1983, denied a motion to dissolve the stay .

the Secretary to support the price of milk. 7 U.S.C. § 1446. The express purposes of the dairy price support legislation are "to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs." Id. § 1446(c). The Secretary is not authorized to pay direct subsidies to producers, but supports the price of milk by standing ready to purchase unlimited quantities of milk products at announced prices. Id.; 48 Fed. Reg. 11,253. The Commodity Credit Corporation (CCC), a federal corporate entity within the United States Depart-

ment of Agriculture,[7] removes excess milk from the market through purchases of surplus butter, cheese, and nonfat dry milk. This program effectively creates a floor for the prices of the products purchased and, indirectly, a floor for the price of all milk and milk products.

In recent years, milk production has greatly exceeded consumer demand. In each of the past two dairy marketing years, the CCC purchased the equivalent of 10 percent of all milk produced in the United States. See 48 Fed. Reg. at 3766. This has created massive inventories of hundreds of millions of pounds each of butter, cheese, and dry milk, with current annual storage costs of around $50 million. In 1982, the federal government

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7/ This corporation is created in 15 U.S.C. § 714.

spent approximately $2.3 billion on the milk price support program.[8/] Id. at 3785.

Congress, responding to the problems of milk overproduction and the increasing cost of the dairy support program,[9/] enacted the amendment in issue as part of

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8/ In 1982, the CCC purchased approximately 68 percent of all nonfat dry milk, 30 percent of all butter and 22 percent of all American cheese produced in this country. As of November 12, 1982, the CCC had inventories of over 400 million pounds of butter, 790 million pounds of cheese, and 1.2 billion pounds of nonfat dry milk. See National Farmers' Organization Inc. v. Block, 561 F. Supp. at 1203.

9/ See 7 U.S.C. § 1446(d)(2) ("the Secretary may provide a deduction of 50 cents . . . to offset a portion of the cost of the price support program."); H.R. Rep. No. 97-687, 97th Cong., 2d Sess. at 8 (1982) (the House Committee on Agriculture reported favorably on a program designed "to achieve supply adjustments by alleviating surpluses which, in the case of the dairy program, have resulted in excessive government costs"); S. Rep. No. 97-504, 97th Cong., 2d Sess. at 83-84.

the Omnibus Budget Reconciliation Act of 1982[10] (the 1982 amendment). The amendment modifies the price support statute in three respects. First, it established the price at which milk shall be supported at not less than $13.10 per hundredweight during the period October 1, 1982, until September 30, 1984, and mandated that this price level be maintained at a comparable percentage of parity[11] for the fiscal year 1984.[12] Second, Congress authorized the 50-cent deduction challenged in this suit. That portion of the amendment

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10/ Pub. L. No. 97-253, § 101, 96 Stat. 763. The Omnibus Budget Reconciliation Act of 1982 sought "to achieve . . . dramatic reductions in Federal spending . . . to wage an effective battle against Federal deficits." S. Rep. No. 97-504, 97th Cong., 2d Sess. at 4.

11/ See 7 U.S.C. §§ 602, 608c(18), 1301(a).

12/ 7 U.S.C. § 1446(d)(1).

provides:

> Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price support program. Authority for requiring such deductions shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent.

7 U.S.C. § 1446(d)(2). Third, Congress authorized the Secretary to impose an additional 50-cent deduction effective

April 1, 1983, that would be refundable to producers who reduce their commercial marketings.13/

The Secretary, on September 22, 1982, projected that for the fiscal year beginning October 1, 1982, the net price support purchases of milk products would be 12.6 billion pounds. The Secretary then published a "notice of determination" in the federal register establishing the price support level at $13.10 for fiscal year October 1, 1982, and imposing the first 50-cent deduction beginning on December 1, 1982. He also published a

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13/ Id. § 1446(d)(3). This second deduction can be imposed only if estimated CCC purchases of milk products exceeds 7.5 billion pounds. While the Secretary has projected that CCC purchases will exceed that amount for fiscal year 1983, he has not yet imposed that deduction. This appeal concerns only the exercise by the Secretary of his discretion to impose the first deduction.

proposed procedure for implementing the deduction program, and invited public comments on "whether the dairy collection plan should be implemented in the manner set forth in this proposed rule. . . ." 47 Fed. Reg. 42,112 (Sept. 24, 1982). The final rule detailing the collection plan was published on November 30, 1982, and was essentially the same as the proposed rule.

The plaintiffs in the district court challenged the Secretary's imposition of the deduction on two grounds: that the legislation was unconstitutional and that the Secretary did not comply with the Administrative Procedure Act in issuing the determination. The district court entered its first preliminary injunction against the deduction on January 11, 1983. The court, considering only the

administrative law challenges, found that the Secretary failed to comply with the Administrative Procedure Act, and that his action imposing the deduction was therefore illegal. State of South Carolina v. Block, 558 F. Supp. 1004 (D.S.C. 1983) (Block I). The court specifically found, among other things, that: (1) the appellants' determination of September 24, 1982, constituted substantive rulemaking under the Administrative Procedure Act, 5 U.S.C. § 551(4); (2) the 1982 amendment vested in the appellants the discretion to impose the 50-cent deduction, but did not require the imposition of the assessment; (3) the Secretary had acted to impose the assessment without complying with the notice and comment provisions of the Administrative Procedure Act; (4) dairy farmers

would be irreparably harmed by the Secretary's action, while the government would not suffer undue harm due to issuance of an injunction; and (5) that issuance of a preliminary injunction was in the public interest. Id.

The Secretary did not appeal the January 11 district court order. Instead, he published another notice designed to remedy the notice and comment defects found by the district court.14/ 48 Fed. Reg. 3764 (Jan. 27, 1983). The notice included a "Summary of Preliminary Regulatory Impact Analysis" and an "Initial Regulatory Flexibility Impact Analysis." Id. at 3765-66. The notice further invited the submission of comments, and stated that the comments

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14/ The Secretary at this time estimated CCC purchases for fiscal year 1983 at 14.2 billion pounds.

submitted in response to the September 24 "notice of determination"[15/] would be considered in determining whether to impose the new deduction requirement. Id. at 3764. The Secretary allowed a 30-day period to receive comments,[16/] and then published a final rule imposing the first 50-cents per hundredweight deduction, beginning on April 16, 1983, and extending through September, 1983. 48 Fed. Reg. 11,253 (March 17, 1983).[17/] In its final determination,

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15/ Some 25,000 comments were submitted, and a number of petitions were received containing 23,000 signatures. Virtually all comments were against the deduction.

16/ Approximately 5000 comments and petitions containing in excess of 500 signatures were received with regard to the second proposed determination.

17/ The final rule states that the deduction "is to be collected in accordance with the regulations published on November 30, 1982 (47 Fed. Reg. 53,831) [7 C.F.R. § 1430.291 et seq. (1983)]." 48 Fed. Reg. at 11,254.

the Secretary responded to the public comments and provided a "Summary of Final Regulatory Impact Analysis." Id. at 1254-55.

The plaintiffs again challenged the program contending that the statutory amendment was unconstitutional, and contending that the Secretary's second attempt to implement the deduction also violated the Administrative Procedure Act. The district court again did not address the constitutional claims, stating that "the problems concerning administrative law are so grave that these alone resolve the case against defendants." Block II, slip op. at 13. The court essentially found that the Secretary's second action in promulgating the rule for the deduction was arbitrary and capricious in three critical respects:

(1) the Secretary did not comply with his statutory responsibility under the Agricultural Act by failing to consider such factors as: the cost of production, returns to producers and the support prices of other commodities; (2) the Secretary had failed to consider important and relevant factors prerequisite to a reasoned decision such as: the impact on dairy farmers, the impact on the economy dependent on dairy farmers, and the regional impact of the program on dairy production; and (3) the Secretary violated the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553, by failing to fairly apprise interested parties of the issues involved in the proposed program, by failing meaningfully to consider important and substantive comments on the

proposed action, and by failing to explain his decision adequately. The district court issued the preliminary injunction[18/] against the Secretary involved in this appeal, but declined to

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18/ In support of its preliminary injunction, the district court further found that:

> (1) the plaintiffs have established a strong showing that, unless they are allowed injunctive relief by this court, they will suffer injuries of a sort which cannot be adequately compensated by a later return of the monies in question;
>
> (2) the defendants have failed to show that an injunction will cause them hardship of a level comparable to the harm that the plaintiffs will suffer if no injunction is issued;
>
> (3) the public interest strongly favors an injunction to prohibit the collection of this deduction.

Block II, slip. op. at 118. See Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977).

grant permanent injunctive relief stating that "the matter is not yet ripe for final resolution." Block II, slip op. at 13.

The Secretary on appeal insists that he complied with the APA. The dairy parties, however, relying on the same three objections successfully raised below, argue that: he failed to consider factors required by the Agricultural Act,[19] that he failed to consider other factors which, although not specified by the Agricultural Act, were critically relevant to his decision, and third, that he violated the notice and comment requirements of the Administrative Procedure Act.

The dairy parties' contentions,

19/ See 7 U.S.C. §§ 1421(b), 1446(c), 1446b.

however, are misplaced. Congress, in passing the controlling legislation, narrowly defined the factors which the Secretary must consider in exercising his discretion, and the record shows that the Secretary considered those factors. The record also reveals that he complied with the notice and comment requirements. His published notice clearly delineates the proposed rule and we feel he sufficiently considered the comments submitted in response to the notice.

Normally, we would not consider the constitutional arguments raised but not considered in the district court. The government contends, however, and we agree, that the record is fully developed and the constitutional questions are ripe for review. Since we feel that the answers to the constitutional questions

are obvious, a remand for initial determination by the district court would be a needless burden on judicial resources. It would also impose needless delays in the final resolution of this matter, which is of crucial and immediate importance to dairy farmers and others in the industry, as well as the government.[20] We therefore hold that the legislation in issue[21] and the Secretary's action pursuant to it[22] are not violative of any provision of the constitution. We thus remand with instructions that the complaint be dismissed.

20/ See Allstate Ins. Co. v. McNeill, 382 F.2d 84 (4th Cir. 1967); Hurwitz v. Directors Guild, 364 F.2d 67 (2d Cir.), cert. denied, 385 U.S. 971 (1966).

21/ 7 U.S.C. § 1446(d)(2).

22/ 48 Fed. Reg. 11,253.

II.

The critical provision of the Agriculture Act in this litigation is section 1446, which defines the price support level for several commodities, including milk. The basic price support scheme contained in that section has been in place since 1949. Prior to the 1982 amendments, section 1446, with regard to dairy products, merely authorized the Secretary to support the price of milk through purchases of milk and milk products at announced prices. The price support level, which has been periodically adjusted by Congress, generally has been expressed as a price above a specified minimum level or as falling within a certain range based on the parity price. The Secretary determines the precise support level for a particular year. One

of the dairy parties' attacks is that the Secretary, in determining to impose the deduction vel non, must act upon the same economic considerations that he is required to consider in fixing the milk price support level. The factors which the Secretary must consider in fixing the support level are specifically contained in section 1446 and other provisions of the Agricultural Act. See, e.g., 7 U.S.C. §§ 1421(b), 1446b.

Section 1446, as amended by the Omnibus Budget Reconciliation Act of 1982, provides in pertinent part:

> The Secretary is authorized and directed to make available . . . price support to producers for . . . milk . . . as follows:
>
> (c) The price of milk shall be supported at such level not in excess of 90 per

centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. Such price support shall be provided through the purchase of milk and products of milk.

(d) Notwithstanding any other provision of law--

(1)(A) Effective for the period beginning October 1, 1982, and ending September 30, 1984, the price of milk shall be supported at not less than $13.10 per hundredweight of milk containing 3.67 per centum milkfat.

(C) The price of milk shall be supported through the purchase of milk and the products of milk.

(2) Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price support program. Authority for requiring such deductions shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should estimate that such net price support purchases during that

fiscal year would be less than 5 billion pounds, the authority for requiring such deduction shall not apply for the balance of the year.

(3)(A) Effective for the period beginning April 1, 1983, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight, in addition to the deduction referred to in paragraph (2), from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Corporation. The deduction authorized by this subparagraph shall be implemented only if the Secretary establishes a program whereby the funds resulting from such deductions would be refunded in the manner provided in this paragraph to producers who reduce their commercial marketings from such marketings during the base period.

To reiterate, Congress again, in this 1982 Omnibus amendment, adjusted the price support level, providing for a minimum level of $13.10 through September 30, 1984. Significantly, Congress departed from the historical approach it had pursued in this area of agricultural legislation. In the past, congressional action simply concerned fixing the price level at which milk products would be supported. In the 1982 amendment, the Secretary was given authority to require dairy farmers to deduct and remit to the Secretary fifty cents from the price they received for each hundredweight of milk. It is this discretion given the Secretary which is central to the issues in this appeal. That discretion to impose the 50-cent deduction is contingent on the

Secretary's projection of milk purchases by the CCC exceeding a specified amount. 7 U.S.C. § 1446(d)(2). Such authority was given to the Secretary for the period October 1, 1982, through September 30, 1985. Id. Congress never before under the dairy support program had authorized the Secretary to reduce the income of dairy farmers or to affect the price of milk except by fixing the price support level.

A.

The dairy parties concede that Congress, by granting the Secretary authority to impose the 50-cent deduction, departed from the historical structure of the Agriculture Act. They nevertheless insist that all of the historical provisions of the Act apply to and con-

trol the Secretary's discretion in imposing the deduction. Specifically, they contend, and the district court held, that sections 1421(a), 1446(c), and 1446b describe "factors" which the Secretary must consider in exercising his discretion to impose the deduction vel non.[23] Section 1446(c) is quoted above. Section 1421(b) describes factors which the Secretary must consider in determining price support. It provides in part:

> (b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such

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23/ The district court also held that 7 U.S.C. § 1441a applied to the Secretary's determination to impose the deduction. That section, however, merely gives the Secretary the general duty to conduct ongoing studies on the cost of production of certain commodities. Id.

operations are carried, shall be determined or approved by the Secretary. The following factors shall be taken into consideration in determining, . . . in the case of any commodity for which price support is mandatory [such as milk], the level of support in excess of the minimum level prescribed for such commodity: (1) the supply of the commodity in relation to the demand therefor, (2) the price levels at which other commodities are being supported, . . . (3) the availability of funds, (4) the perishability of the commodity, (5) the importance of the commodity to agriculture and the national economy, (6) the ability to dispose of stocks acquired through a price-support operation, (7) the need for offsetting temporary losses of export markets, (8) the

> ability and willingness of producers to keep supplies in line with demand.

Section 1446b provides:

> The production and use of abundant supplies of high quality milk and dairy products are essential to the health and general welfare of the Nation; a dependable domestic source of supply of these foods in the form of high grade dairy herds and modern, sanitary dairy equipment is important to the national defense; and an economically sound dairy industry affects beneficially the economy of the country as a whole. It is the policy of Congress to assume a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and

> butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy.

Contrary to the dairy parties' contentions, however, it seems clear that what Congress intended in enacting section 1446(d)(2) was a self-contained, temporary change in the dairy support program in response to the immediate problems of increasing overproduction and the burgeoning cost of the price support program. Congress prefaced section 1446(d) with the phrase "[n]otwithstanding any other provision of law." It then articu-

lated in section 1446(d)(2) specific factors the Secretary must consider in deciding to impose the first 50-cent deduction: the overproduction of milk; the cost of the milk price support program; the expected amount of CCC purchases; and the relevant time periods. The legislative history shows that Congress considered the effects on the economy of imposing the 50-cent deduction, the government budgetary problems and the individualized hardships it would impose on dairy farmers. After considering these factors in hearings and debates, it provided the Secretary with a narrowly-defined discretionary authority to implement the deduction. The statutory parameters of his discretion were set forth in section 1446(d)(2), which provides that the Secretary has such

authority for only three fiscal years, October 1, 1982 through September 30, 1985, that such authority applies only if the Secretary estimates that the CCC will purchase in excess of 5 billion pounds of milk products, and the proceeds must be "remitted to the CCC to offset a portion of the cost of the milk price support program." There is no indication that Congress intended for the Secretary to consider factors contained in other provisions of the Agriculture Act.

The substance of all the statutory provisions which the dairy parties would have the Secretary apply in exercising his discretion to impose the deduction was in place long before the 1982 amendment became law. Section 1421(b) specifically states that it applies to the Secretary's actions under the milk

program only for purposes of "determining . . . the level of support in excess of the minimum level prescribed for [milk]." Section 1446(c), in listing the factors to be considered by the Secretary, specifically states that they are to be considered in setting the price support level for milk. Section 1446b is entitled "Promotion of increased use of dairy products," a concern of little relevance to the purposes of section 1446(d)(2).24./ Indeed, most, if not all, of the factors listed in the above provisions were considered by Congress in enacting the deduction portion of the 1982 amendment. See Schweiker v. Gray Panthers, 453 U.S. 34, 50 n.22

24/ In deciding to exercise his discretion, however, the Secretary did consider many of the factors listed in section 1446b. See 48 Fed. Reg. at 11,255.

(1981).

We conclude that the statutory factors reflecting congressional policy contained in 7 U.S.C. §§ 1421(b), 1446(c) and 1446b apply only to the Secretary's responsibility in fixing the price support level, not to his responsibility in determining whether to impose the deduction. On the contrary, Congress narrowly defined the factors he should consider in exercising this latter discretion: whether surplus milk production would exceed five billion pounds and whether this deduction program would lower the government milk support costs. The record reflects that the Secretary considered the statutory requirements imposed upon him by Congress. If statutory requirements are satisfied, a court cannot set aside an administrative

decision simply because it "is unhappy with the result reached." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U .S. 519, 558 (1978).

The Secretary projected milk production and CCC purchases with and without imposition of the 50-cent deduction for fiscal year 1983 as shown in his "Summary of Final Regulatory Impact Analysis" as follows:

> With price support at $13.10 per hundredweight, production is projected to be 138.6 billion pounds for fiscal year 1983 if there is no deduction program, up 3.6 billion pounds from fiscal year 1982. Relatively low feed prices, resulting from record crop production, will keep milk feed price relationships favorable for increased production. Commercial consumption is projected to increase

1.9 billion pounds to 124.0 billion pounds, milk equivalent, because of relatively stable retail prices and increased population. It is estimated that CCC removals in fiscal year 1983 will be 14.7 billion pounds, up about 0.9 billion pounds or about 8.5 percent more than a year earlier. Despite the upward trend in consumption, purchases would continue to exceed dispositions and CCC stocks would continue to build--a condition that has existed since October 1979.

Even with implementation of a 50 - cents per hundredweight deduction on April 16, 1983, milk production in fiscal year 1983 is likely to increase from the fiscal year 1982 level by 3.2 billion pounds. Implementation of a $1.00 per hundredweight deduction would result in production increasing

by 2.8 billion pounds. Neither of the two deduction programs would have a great downward effect upon milk production this fiscal year because they would not become effective until the season of highest milk production has begun.

Net price support purchases during fiscal year 1983 are projected to be 14.3 billion pounds, at a cost of $2,375 million if a 50-cent per hundredweight deduction is imposed on April 16, 1983 and 13.9 billion pounds, at a cost of $2,314 million if the deduction is $1.00 per hundredweight. Net outlays before deductions, are projected to be $2,433 million with a 50-cent per hundredweight deduction and $2,372 million with a $1.00 per hundredweight deduction. During the period April 16, 1983, through September 30, 1983, a

> 50-cent per hundredweight deduction will likely total $324 million and $1.00 per hundredweight deduction will total $646 million. Therefore, net CCC outlays for the fiscal year, after deductions, are projected to be $2,109 million assuming a 50-cent deduction and $1,726 million assuming a $1.00 deduction. These figures compare with an estimated purchase cost of $2,282 million and a net outlay of $2,438 million for fiscal year 1982, and an estimated purchase cost of $2,438 and a net outlay of $2,496 million for fiscal year 1983 if there is no deduction.

48 Fed. Reg. at 11,254-55. The Secretary also determined that the 50-cent deduction would help to reduce the overproduction of milk, as shown in his "Initial Regulatory Flexibility Impact Analysis" as follows:

Failure to implement any deduction would fail to accomplish CCC's stated objectives and would result in a continuation of the present situation where milk production exceeds commercial consumption and Commodity Credit Corporation purchases large amounts of dairy products under the milk price support program at great expense.

Neither of the two deduction programs will have a great downward effect upon milk production during this fiscal year because they would not become effective until the season of highest milk productions (the flush) has begun. The effect upon milk production will begin to be felt after the flush in the summer months as pastures begin to deteriorate, and later in the fall when cows are taken

> off pasture and moved into barns.

48 Fed. Reg. at 3766.

Moreover, although the Secretary was required to consider only the three statutory factors, he in fact ranged over a broader spectrum of considerations in deciding to exercise his discretion to impose the 50-cent deduction. The Secretary's impact analysis is illustrative where he states:

> The proposal will assure an adequate supply of milk and dairy products and will encourage efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment. It also will assure dairy farmers as a whole of a fair return for their labor and investment while assuring an adequate supply of pure and wholesome milk to

> meet current needs. The proposal will assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. The proposal also reflects the recent reduction in the cost of feed and increased efficiency in production. Some marginal operators may not be able to profit under the proposal but the statute does not guarantee each and every dairy farmer a profit while requiring the accumulation of huge CCC stocks of surplus dairy products

48 Fed. Reg at 3765-66. See 7 U.S.C. § 1446b.

We conclude, therefore, that the Secretary did not act in an arbitrary and capricious manner by failing to consider additional factors contained in other provisions of the Agriculture Act in

implementing the 50-cent deduction. He not only considered the specific factors Congress legislatively required of him, but also considered other general policies underlying the national economy and the price support program.

B.

The district court held that the Secretary was required by the Administrative Procedure Act not only to consider the legislative factors previously listed, but other general factors nowhere explicitly mentioned in the controlling legislation. 5 U.S.C. § 706(2). It specifically found, among other things, that the Secretary improperly failed to consider in determining to impose the deduction: (1) the impact on dairy farmers; (2) the impact on the economy dependent

on dairy farmers; (3) the regional impact on the dairy industry; and (4) the impact on milk production.

The district court fell into the same error in making these findings as it did in concluding that additional sections of the Agriculture Act must be considered. Again, Congress specifically, and we think emphatically, granted the Secretary discretion to decide whether to impose the deduction. It directed him to project whether CCC purchases would exceed 5 billion pounds and whether the deduction program would lower the cost to the government of the support program.25/ As already noted, the Secretary properly considered these factors. Courts are not free to add substantive or procedural hurdles for agen-

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25/ 7 U.S.C. § 1446(d)(2).

cies to overcome if Congress has not established such requirements. See Baltimore Gas & Elec Co. v. NRDC, 76 L.Ed. 437 (1983). Having met those requirements, it cannot be said that the Secretary's actions were arbitrary and capricious for failure to consider the factors which a court might feel are appropriate but which were either considered and rejected by Congress, or simply not included by Congress as factors which the administrative agency must consider.

The finding that the Secretary failed to comply with the notice and comment requirements of the APA, 5 U.S.C. § 553, was also in error. The district court held first that the information made available to the public was critically deficient in that it did not reveal

the information animating the defendant's proposal to a sufficient degree to allow effective public comment; second, that the Secretary did not adequately respond to comments; and third, that he failed adequately to explain his decision. We consider these district court findings in that sequential order.

First, section 553(b)(3) provides that a "notice" shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The notice requirement is to fairly appraise interested parties of the issues involved in the rulemaking proceedings. Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 32 1-22 (4th Cir. 1980); Consolidation Coal Co. v. Costle, 604 F.2 d 239, 248 (4th Cir. 1979). Notice is sufficient if it affords inter-

ested parties a reasonable opportunity to participate in the rulemaking process. Forester v. Consumer Product Safety Comm'n, 559 F.2d 774, 78788 (D.C. Cir. 1977).

We believe the dairy parties and the interested public were fairly apprised of the "subjects and issues involved" regarding the Secretary's proposal to implement the 50-cent deduction. 5 U.S.C. § 553(b)(3). The proposal explained the background of the proposed rule, described the milk price support program, and provided a summary of the proposed rule. It further discussed the expected effect of the regulation, the reasons for the action, the objectives and legal basis for the proposed rule, and a number of other considerations The deduction program was designed by

Congress itself following hearings and debate. Leaders in the dairy industry followed those congressional proceedings closely. As to them, the notice did not newly introduce the problem.

Second, the Secretary adequately responded to comments he had received after publishing the notice. The purpose of allowing comments is to permit an exchange of views, information, and criticism between interested persons and the agency. See Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). There is no requirement for the Secretary to discuss every fact or opinion contained in the public comments. General Telephone Co. v. United States, 449 F.2d 846, 862 (5th Cir. 1971); Hiatt-Grain-& Feed, Inc. v. Bergland, 446 F. Supp. 457, 484 (D.

Kan 1978), aff'd, 602 F.2d 919 (10th Cir. 1979), cert. denied, 444 U.S. 1073 (1980). Instead, the Secretary is obligated to identify and comment on only the relevant and significant issues raised during the proceeding. Home Box Office, 567 F.2d at 35 n.58; Community Nutrition Institute v. Bergland, 493 F.Supp. 488, 492-93 (D.C. 1980).

The Secretary enumerated all of the comments he had received with regard to the proposed deduction rules, and stated that "all comments bearing on the determination have been considered " 48 Fed. Reg. at 11,254. He responded specifically to a number of comments, such as ones stating that the deduction would not reduce milk production, that it would not balance supply and demand, that large numbers of small farmers would be put out

of business, and other comments suggesting increased donations of dairy products, a reduction in the support price, termination of the milk price support program, and an exemption from the deduction for producer-handlers. Id. Most of the comments concerned alternatives to the deduction program outside the scope of the Secretary's authority, or concerned factors and issues irrelevant to implementation of the deduction or which had already been considered by Congress in enacting the deduction amendment. See Schweiker v. Gray Panthers, 453 U.S. 34, 50 n.22 (1981). Having responded to the comments concerning the major factors relevant to a decision to implement the deduction and a number of others, the Secretary did not violate the comment requirement contained in 5 U.S.C.

§ 553(c).

Third, the district court ruled that the Secretary's explanation of the final rule did not enable the court to discern the agency's reasoning, and thus frustrated judicial review 5 U.S.C. § 553(c). We feel that the Secretary adequately explained his decision to impose the first 50-cent deduction.

The APA does not require an exhaustive explanation of an administrator's reasoning for adopting a rule. Required is "a concise general statement [of the regulation's] basis and purpose." Appalachian Power Co. v. EPA, 579 F.2d 846, 854 (4th Cir 1978), quoting United States v. Allegheny-Ludlum Steel Corp , 406 U.S. 742, 758 (1972). There is no obligation to make references in the agency explanation "to all the specific

issues raised in comments." Appalachian Power Co., 579 F.2d at 854, quoting Kennecott Copper Corp v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972); Consumers Union of U.S., Inc. v. Consumer Product Safety Comm'n, 491 F.2d 810, 812 (2d Cir. 1974). The agency's explanation must simply enable a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did." General Telephone Co. v. United States, 449 F.2d 846, 862 (5th Cir. 1971), quoting Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). See also Amoco Oil Co. v. EPA, 501 F.2d 722, 739 (D.C. Cir. 1974).

The facts and policy concerns relied on by the Secretary are clearly set forth

in the statement of basis and purpose in the final rule. In his "Summary of Final Regulatory Impact Analysis," the Secretary demonstrates that milk production is expected to increase; that CCC purchases will continue to increase despite a deduction program; and that without a deduction program, the CCC will have to spend accelerating amounts to support the price of dairy products. The Secretary also projected that CCC purchases would greatly exceed 5 billion pounds in fiscal year 1983, and that imposing the 50-cent deduction would reduce the amount the government would have to spend in that fiscal year. The Secretary thus articulated an adequate factual basis for his decision to impose a 50-cent deduction and clearly explained that decision.

III.

The constitutional contentions merit little discussion. As we previously indicated, we normally would not entertain these issues since they were not considered by the district court and the resolution of the constitutional questions are not necessary to support our decision to reverse the action of the district court issuing the preliminary injunction. If we ruled solely on the district court's holding relating to violation of the APA, however, the constitutional issues surely would be raised again on remand with attendant delays of hearing and appeal. Since we have decided the administrative law issues adversely to the dairy parties, only their constitutional claims remain. No factual issues inhibit our full under

standing of those claims, and the asserted constitutional principles are well settled. The development of those issues in district court would provide us with little assistance in disposing of the constitutional arguments. Therefore, with some hesitancy in departing from our well-established and trusted rule that we not meet constitutional problems unless necessary to the resolution of the appeal, we briefly consider the fully developed facts under well established principles of constitutional law.

The dairy parties first argue that the deduction, which is to be imposed by the Secretary, violates the constitutional provisions governing the taxing power. They specifically argue that it violates Art. I, § 7, cl. 1, in that it is a tax not originating in the House of

Representatives. They further argue that the deduction violates Art. I, § 8, cl. 1, because Congress cannot delegate the "power to lay and collect taxes," and because the funds generated by the deduction do not go to the United States Treasury for the "general welfare."

The deduction, however, is not a tax. The mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised. Head Money Cases, 112 U.S 580 (1884). The imposition of assessments have long been held to be a legitimate means of regulating commerce. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942). If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax. United

States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957); Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943).

The clear language and structure of the 1982 amendment indicates that its primary purpose is regulation. The statute's regulatory purpose is to reduce overproduction of milk and shift some of the financial burden of the price support program. Accordingly, the dairy amendment bears the indelible imprimatur of the commerce power and is not an unconstitutional exercise of the taxing power.

There likewise is no merit to the contention that the involved statute unconstitutionally delegates legislative power to the Secretary. The legislative history of section 1446(d)(2) reveals

that Congress clearly delineated the policy objectives of reducing milk production and reducing the increasing cost of the milk price support program. The statute clearly describes the effective dates during which the deduction may be implemented, the specific amount of the deduction, and requires a minimum level of expected government purchases before the deduction can be imposed. Congress thus clearly delineated "the general policy, the public agency which will apply it, and the boundaries of the delegated authority." Electric Power & Light Corp v. SEC, 329 U.S. 90, 105 (1946).

The dairy parties finally contend that section 1446(d)(2) is not a valid exercise under the commerce clause, Art. 1, § 8, cl. 3. The test of this issue is simply stated by the Supreme

Court ruling in Hodel v. Indiana , 452 U.S 314 (1981): "A court may invalidate legislation under the commerce clause only if it is clear that there is no rational basis between the regulatory means selected and the asserted ends." Id. at 323-24. The dairy parties themselves are reaching for the irrational, contending that there exists no rational basis between the means -- lowering the financial rate on milk -- and the ends sought by Congress -- a decrease in milk production and a contribution by milk suppliers to the cost of the support program. Indeed, the milk support program, which has been in effect for many years without challenge, is premised on the link between profitability and

production.[26]/

IV.

We may well consider the tool given the Secretary to be blunt, and its use by the Secretary to effectively drive some producers "out-of-business" to be harsh as it applies to small dairy operations. It is clear, however, that Congress was aware of the possibility of harsh results to some small farmers. The Secretary, on appeal, admits that reduction to gross income by 4 percent will force some dairy families to cease their

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26/ The dairy industry also alleged that section 1446(d)(2) as imposed violates the equal protection and due process requirements of the fifth amendment. These claims are clearly without merit. See Reed v. Reed, 404 U.S. 71, 75 -76 (1971); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Larsen v. Block, C/A No. NC-82-0222W (D. Utah March 28, 1983).

farming operations. The current unprecedented high expense of farming, the inherent cost inefficiency of operating a family farm, and the resulting small percentage of gross income ultimately realized as a profit, makes this sometimes cruel prospect a stark reality. Were we the Secretary, we might well have searched long for a more humane alternative, but our judicial task is not to substitute our judgment for that of the administrative agency. We are limited in our review to determining whether the Secretary acted constitutionally under a constitutional statute, followed the mandate of Congress, and in accordance with the APA.

The Secretary's actions implementing the 50-cent deduction authorized in section 1446(d)(2) were not, under our

standard of review, arbitrary or capricious, nor in excess of statutory authority or limitations. 5 U.S C. § 706(2). We further hold that section 1446(d)(2) and its application withstand constitutional scrutiny. The order of the district court, therefore, is vacated and remanded for dismissal of the complaint.

VACATED AND REMANDED.

IN THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF SOUTH
CAROLINA

COLUMBIA DIVISION

STATE OF SOUTH CAROLINA, ex rel D. LESLIE TINDAL, Commissioner of Agriculture, STEVEN W. HAMM, as South Carolina Consumer Advocate, SOUTH CAROLINA FARM BUREAU, FRANK FLOWERS, W. CHARLES McGINNIS, LAWRENCE WEATHERS Plaintiffs, SUNCOAST MILK PRODUCERS COOPERATIVE 1009 57th Street East Bradenton, FL 33508 INDEPENDENT DAIRY FARMERS ASSOCIATION, INC. 4400 Southeast 36th Street Fort Lauderdale, FL 33314 TAMPA INDEPENDENT DAIRY FARMERS'ASSOCIATION, INC. 501 East Kennedy Boulevard Tampa, FL 33601	]	CIVIL ACTION NO. 82-3172-0 PRELIMINRY INJUNCTION

UPPER FLORIDA MILK PRODUCERS ASSOCIATION
5654 Dunn Avenue
Jacksonville, FL 32218

GEORGIA MILK PRODUCERS, INC.
177 Washington Street, S.W.
Atlanta, GA 30303

COBLE DAIRY PRODUCTS COOPERATIVE, INC.
North Main Street
Lexington, NC 27292

INTER-STATE MILK PRODUCERS COOPERATIVE, INC.
1225 Industrial Highway
Southampton, PA 18966

DAIRYMEN, INC.
10140 Linn Station Road
Louisville, KY 40223

ASSOCIATED MILK PRODUCERS, INCORPORATED,
Wedgewood Prof. Bldg.
6609 Blanco Road
San Antonio, TX 78216

Plaintiffs-Intervenors,

-vs-

JOHN R. BLOCK, Secretary of the United States Department of Agriculture, UNITED STATES DEPARTMENT OF AGRICULTURE, and COMMODITY CREDIT CORP.

Defendants.

For the reasons set forth in the Memorandum Opinion and Order separately filed this date in this action,

It is hereby Ordered that, pending further order of this Court, the defendants John R. Block, Secretary of the United States Department of Agriculture, the United States Department of Agriculture, and the Commodity Credit Corporation, and all persons, firms and agencies acting in concert with them, be and each of them is preliminarily enjoined from implementing the Determination made and announced by the Secretary of Agriculture on March 17, 1983, 48 Fed. Reg. 11,253 (1983), by collection or requiring the deduction of fifty cents per hundredweight from the sale of milk marketed commercially in the United States.

Further, the defendants are hereby Ordered to return forthwith any and all sums of money heretofrom collected under the authority of the Determination announced by the Secretary of Agriculture of March 17, 1983.

IT IS SO ORDERED.

/s/
MATTHEW J. PERRY
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina

June 3, 1983

IN THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF SOUTH
CAROLINA

COLUMBIA DIVISION

STATE OF SOUTH CAROLINA, ex rel D. LESLIE TINDAL, Commissioner of Agriculture, STEVEN W. HAMM, as South Carolina Consumer Advocate, SOUTH CAROLINA FARM BUREAU, FRANK FLOWERS, W. CHARLES McGINNIS, LAWRENCE WEATHERS Plaintiffs, SUNCOAST MILK PRODUCERS COOPERATIVE 1009 57th Street East Bradenton, FL 33508 INDEPENDENT DAIRY FARMERS ASSOCIATION, INC. 4400 Southeast 36th Street Fort Lauderdale, FL 33314 TAMPA INDEPENDENT DAIRY FARMERS'ASSOCIATION, INC. 501 East Kennedy Boulevard Tampa, FL 33601	CIVIL ACTION NO. 82-3172-0 MEMORANDUM OPINION AND ORDER

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Plaintiffs-Intervenors,

-vs-

JOHN R. BLOCK, Secretary of the United States Department of Agriculture, UNITED STATES DEPARTMENT OF AGRICULTURE, and

COMMODITY CREDIT CORP.]
]
Defendants.]

INTRODUCTION

This matter is before the Court pursuant to motions by the plaintiffs and the plaintiffs-intervenors for an injunction against implementation by the defendants of a second "determination" by the Secretary of Agriculture of the United States requiring a deduction of fifty cents per hundredweight from the proceeds of milk marketed commercially in the United States. A decision by the Secretary to impose a previously announced deduction was enjoined by this Court on January 11, 1983. State of South Carolina ex rel Patrick v. Block,

558 F. Supp. 1004 (D. S.C. 1983). Thereafter, on March 17, 1983, the Secretary promulgated the determination which precipitated the filing of the instant motions. The plaintiffs and the intervenors claim the right to relief as to this determination for all of the reasons which they advanced in their original pleadings concerning the Secretary's previous determination. Those allegations were summarized in the January 11, 1983 opinion and order of this Court. See, 558 F. Supp. at 1006, 1007. The defendants contend inter alia that the Secretary has now complied with all of the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. in promulgating this regulation and that, moreover, contrary to contentions made by the intervenors, imposition of the

fifty cents per hundredweight deduction is not an unconstitutional tax.

Additionally, the parties have filed cross motions for summary judgment as to all pending issues.

A hearing on pending motions was held on April 12-14, 1983. The Court granted plaintiffs' motions for change of counsel, for change of relator and to supplement the complaint. The Court also granted the motion of Associated Milk Producers, Inc. (AMPI) to intervene as a party plaintiff. AMPI had appeared in the prior heading in the cases as amicus curiae. The Court has also received, and has granted, petitions for leave to submit memoranda from the Commonwealth of Puerto Rico and the Pennsylvania Farms Union, Inc, as amicus curiae. As previously noted 558 F. Supp.

at 1007, collectively, the plaintiffs, the intervenors and the amicus curiae represent a substantial segment of the dairy farmers of America.

During the hearing on April 12, 1983, the Court heard from several witnesses for plaintiffs and plaintiffs-intervenors. On April 13, the defendants were permitted to present a previously undisclosed witness, Mr. Dawson Ahat, Acting Deputy Undersecretary for International Affairs and Commodity Programs. Prior to Mr. Ahalt's testimony, the defendants presented the testimony of Dr. Charles Shaw, Leader of the Dairy/Sweetners Group, Analysis Division of the Agriculture Stabilization and Conservation Service of the Department of Agriculture. Dr. Shaw had previously testified at the hearing of January 3-4. The

Court also received from the defendants the "administrative record" a box of photocopied materials, primarily official Department of Agriculture publications, an estimated 5,000 pages, gross weight: 41 pounds.1/ The Court also took

1/ From the cover letter explaining these materials: The enclosed documents are arranged by "books" as follows: (a) Book 1--All official documents and related press releases produced in connection with the March 17, 1983 determination; (b) Book 2--the July 1980 through March 1982 issue of Dairy Situation, an official Department of Agriculture (USDA) dairy report; (c) Book 3--miscellanous current statistical summaries, including estimates prepared by USDA's Dairy Interagency Estimates Committee; (d) Books 4 and 5--copies of the January 1982 and subsequent issues of Dairy Market News, a weekly bulletin of dairy market developments; (e) Book 6--copies of recent issues of USDA's Dairy Products and Milk Production (statistical publications relating to dairy production); (f) Book 7--copies of the Agricultural Supply and Demand Estimates; (g) Book 8--copies of the 1980-82 issues of USDA' Cold Storage, report of nationwide cold storage data; and (h) Book 9--the monthly issues from May 1981 through December 1982 of USDA's

FOOTNOTE CONT'D ON NEXT PAGE

judicial notice of the record of the earlier proceedings in this case.

At the close of the hearing, the Court indicated its views. It appeared to the Court at the time that the defendants had complied with at least the salient features of notice and comment rulemaking under 5 U.S.C. § 553, and the course of conduct did not appear to be arbitrary or capricious. The Court therefore did not at the time, grant the motions for injunctive relief, taking the matter under advisement.

At that juncture, this Court was deeply troubled by this case and suggested at the close of the hearing that it appeared that the key questions were

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FOOTNOTE CONT'D FROM PREVIOUS PAGE
Agricultural prices, a report of agriculture prices for a number of commodities and the 1980 and 1981 annual summaries of the same publication.

constitutional.

Subsequently, in bringing order to the complex and voluminous record in this case, my suspicions of a breakdown were borne out: I find unavoidable the conclusion that the Secretary is acting contrary to the applicable law. I have found, however, that the violations were of administrative law rather than constitutional law.

By May 5, although not prepared to respond fully to the many complex questions raised in the case, the Court was convinced that the Secretary, in imposing the fifty-cents per hundredweight deduction, had violated the Administrative Procedure Act. Aware that the actual collection process, the taking of money, was about to commence for grade B milk producers, the Court on May 5 issued a

Temporary Restraining Order barring collection of the deduction pending issuance of this Opinion. That Temporary Restraining Order was stayed on May 13, by an Order of the Court of Appeals for the Fourth Circuit, pending issuance of this opinion.

Having carefully considered the issues in this case, this Court adheres to the position suggested by the Temporary Restraining Order of May 5. The Secretary has violated the Administrative Procedure Act, 5 U.S.C. § 551 et seq. Therefore, under 5 U.S.C. § 706, the fifty-cents per hundredweight deduction on the commercial sale of milk is held unlawful; the Secretary's imposition of the deduction requirement is set aside; all further collection under the Secretary's determination is enjoined;

and the Secretary is ordered to return forthwith all monies previously collected.

I.

THE FACTS

On September 8, 1982, the President signed into law the Omnibus Budget Reconciliation Act of 1982. One section of that multi-faceted act, § 101, concerns the dairy support price system. Under that section, now codified as 7 U.S.C. §§ 1446(c) & (d), the Congress delegated to the Secretary of Agriculture the discretionary authority to impose two fifty-cents per hundredweight deductions on all commercial sales of milk. See P.L. 97-253.

On September 24, 1983, by a Notice

of Determination published in the Federal Register, the Secretary of Agriculture announced the imposition of the first deduction requirement authorized by section 101. 47 Fed. Reg. 42,128 (Sept. 24, 1982).

Subsequently, the plaintiffs herein brought an action in this Court to enjoin the collection of this deduction. The plaintiffs contended that the defendants had failed to observe the legal mandates of the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and specifically had failed to provide for notice-and-comment in informal rulemaking as is required by that statute.

The action came on for an initial hearing on December 21, 1982. At that time, the Court entered a temporary restraining order, barring the collection

pending a more comprehensive hearing. The matter came on for hearing on January 3-4, 1983. During that hearing, this Court heard a thorough presentation of evidence and argument by all sides. At the close of the hearing, the Court took the matter under advisement, continuing its temporary restraining order.

On January 10, 1983, this Court issued an injunction against the collection of the deduction requirement promulgated in the Notice of Determination of September 24, 1982. In an opinion and Order issued on January 11, 1983, the Court discussed at length the various claims concerning the deduction requirement, finding that the imposition of this deduction requirement is rulemaking as defined by the Administrative Procedure Act, 5 U.S.C. § 551, and is therefore

subject to the requirements of 5 U.S.C. § 553; that the Secretary of Agriculture has waived the "benefits" exception and cannot take advantage of this exemption to the notice and comment procedures required by 5 U.S.C. § 553; that there was no "good cause" excusing the Secretary from the notice and comment requirement of 5 U.S.C. § 553(b)(B); and that the Secretary's actions in imposing the deduction did not constitute "substantial compliance," but were rather an egregious violation of the Administrative Procedure Act. State of South Carolina ex rel. Patrick v. Block, 558 F. Supp. 1004 (D. S.C. 1983).

Based on these findings, this Court concluded that the plaintiffs in the January action had established an overwhelming likelihood of success on the

merits. 558 F. Supp. at 1022-23. The Court also found that the plaintiffs had made a substantial showing that the implementation of the deduction requirement would cause irreparable injury; that the defendants had not shown that the imposition of a preliminary injunction would cause them irreparable injury, so that the balance of hardship favored the issuance of an injunction for the plaintiffs; and that the public interest, and particularly the need to hold the defendants to a close observance of the law favored issuance of an injunction.

Following the issuance of the preliminary injunction the defendants took no appeal. Rather, on January 21, the defendants Secretary of Agriculture announced that the government would issue a proposed rulemaking under which

it would proposed to implement both the first and the second fifty-cents per hundredweight deductions authorized by the Omnibus Budget Reconciliation Act. On January 27, 1983, there appeared in the Federal Register a Notice of Proposed Determination (48 Fed. Reg. 3,764 (Jan. 27, 1983)). By this Notice:

> Commodity Credit Corporation proposes . . . that $1.00 per hundredweight to be deducted from the proceeds of sale of all milk marketed commercially by producers during the period April 1, 1983 through September 30, 1983, with 50-cents per hundredweight being refuned to producers who reduce their commercial milk marketings by 10.3 percent from marketings during a designated based period.

48 Fed. Reg. at

3,764.

This Notice invited the submission of comments, and promised that comments submitted in response to the September 24 Notice of Determination would also be considered in determining whether or not to impose the new deduction requirement. See 48 Fed. Reg. at 3,764 (1983).

On February 15, counsel for the plaintiffs-intervenors, Suncoast Milk Producers Cooperative, et al., hand-carried to the Department a letter requesting that they be provided with certain underlying studies which they viewed as pertinent to an evaluation of the proposed deduction requirement. The defendants have never responded to this letter.

On February 28, 1983, the Secretary met with a delegation of farmers from

upstate New York who had come to Washington, D.C., to protest the deduction requirement. In meeting with these dairy farmers, the Secretary made statements indicating his determination to impose the deduction.2/

On March 16, 1983, the defendants announced that the first fifty-cents per hundredweight assessment would be imposed, effective April 16. Explaining the reason for the imposition of the deduction requirement, the Secretary

2/ The defendants have objected to this Court's consideration of these statements by the Secretary, citing as authority Hiatt Grain Feed, Incorporated v. Bergland, 446 F. Supp. 457, 483-84 (D. Kan. 1978). Upon reading that case, I find it is totally inapposite to this situation. The statements complained of in that case were general statements made before Mr. Bergland ever took his position as Secretary of Agriculture, and certainly never had any specific relation to a rulemaking which he was considering at the time the statement were made.

stated:

> We have no choice but to again implement the first assessment . . . [W]e really have no other alternative. That is the only option Congress has given to us, and it would be fiscally irresponsible to ignore a tool which will save up to $60 million per month of the taxpayers' money. . . .
>
> Block said the first assessment would be maintained from April 16 until new legislation becomes effective. "If sufficient resolution is not forthcoming by Aug. 1, we will be forced to look again to implementation of the second 50-cent assessment. . . ."
>
> Press Release, at 1 (Mar. 16, 1983).
>
> Yet we at the Department had no choice in the matter. The assessment was the only tool that Con-

> gress handed to us that would bring down program costs. It wasn't a mandatory assessment, but it might as well have been. Congress actually took credit for the savings in the budget.

Dairy Policy Statement by Agriculture Secretary John R. Block at 4 (Mar. 16, 1983).

> [T]his was the only tool given to us by Congress. Something had to be done to keep the cost to the taxpayers down, . . .

Id. at 5.

> First, we have no choice but to implement the first 50-cent assessment. That is the only option Congress has given to us, and it would be fiscally irresponsible to ignore a tool which will save up to $60 million per month of the tax payers'

> money. For that reason, I have directed that the first 50-cent assessment be implemented, effective April 16.

Id. at 8.

The following day, the Secretary published in the Federal Register a Notice of Determination stating:

> The Commodity Credit Corporation (CCC) hereby determines that as part of the milk price support program, 50-cents per hundredweight shall be deducted from the proceeds of sale of all milk marketed commercially by producers during the period of April 16, 1983 through Septmeber 30, 1983.
>
> 48 Fed. Reg. 11, 253 (Mar. 17, 1983).

Discussing the impact of this deduction requirement, the Notice stated:

> Some individual pro-

ducers will be more seriously affected by the deduction than others. The price support program, however, does not guarantee profit to every dairy farmer.

* * * [T]he first of the two statutory conditions that must be met before a deduction of $1.00 per hundredweight on commercial milk marketing is imposed has been satisfied. However, the statute also requires that there be a program for refunding 50-cent of that $1.00 to producers who reduce commercial marketing by a prescribed amount. The Department published, on January 27, 1983, a proposal for the implementation of a $1.00 per hundred weight deduction and a refund program, but no final regulation establishing a refund program has been published. Therefore, only a 50-cent, not the proposed

$1.00, per hundredweight deduction may be imposed at this time

* * * Relatively low feed prices, resulting from record crop production, will keep milk-feed price relationships favorable for increased production.

48 Fed. Reg. at 11,254.

"[E]very milk producer in the United States who markets milk commercially will be affected by the program. A 50-cent deduction represents less than 4 percent of producers gross income from milk and a $1.00 deduction represents less than 8 percent of producers gross income from milk. Since this determination is effective only for the period April 16, 1983, through September 30, 1983, this effective will be approximately halved for producers' income during fiscal year 1983.

48 Fed. Reg. at 11,255.

In response to this Notice, the plaintiffs and plaintiffs-intervenors moved for supplemental preliminary injunctive relief. The matter came on for hearing on April 12-14, 1983. During the April 12 taking of evidence, the plaintiffs and plaintiff-intervenors introduced evidence, both in the form of documentary exhibits and in the form of the testimony of an expert witness, evidence pointing to deficiencies in the various impact statements which had been proffered to the Court as part of the defendants' administrative record.

At the close of the hearing on April 14 this Court took the matter under advisement to consider the many questions which this case presented. As with the January litigation, these questions can

be broadly grouped under two general headings: Constitutional law and administrative law.

Although in initially appeared to this Court that the pre-eminent questions were those concerning the constitutionality of § 101 of the Omnibus Budget Reconciliation Act, on thorough consideration, I have determined that the problems concerning administrative law are so grave that these alone resolve the case against the defendants. Therefore, the Court confines its resolution to these questions. Further, I believe the matter is not yet ripe for final resolution via summary judgment, and will therefore, for the time being deny the cross-motions for summary judgment, with all parties having leave to renew these motions in the future.

II.

ON INJUNCTIONS

In this circuit, the leading case expounding the requirements for the issuance of a preliminary injunction is Blackwelder Furniture Company of Statesville, Incorporated v. Seiling Manufacturing Company, 550 F.2d 189 (4th Cir. 1977). As the Court therein indicated, the proper test for resolving a motion for preliminary injunction involves the flexible interplay of four factors: 1) the possibility of irreparable harm to the plaintiffs if injunctive relief is deined; 2) the apparent strength of the plaintiffs' case on the merits; 3) the potential harm to the defendant if the preliminary injunctive relief does issue;

and 4) the public interest.

The court in Blackwelder, and many othe courts speaking to this question, have emphasized that all four of these factors are to be considered in deciding whether a preliminary injunction should issue pending a full trial on the merits of the controversy. Further, the courts have stressed the need for a flexible interplay among these four factors, the goal in any case being the preservation of the status quo pending full litigation. See, e.g., Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495 (4th Cir. 1981); Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1032 (4th Cir. 1980); Jacksonville Port Authority v. Adams, 556 F.2d 52 (D.C. Cir. 1977); Banks v. Trainor, 525 F.2d 837, 841 (7th Cir. 1975); Virginia Petroleum Jobbers

Assoc. v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1985) [sic]; O. Fiss, Injunctions 168 (1972).

In this case, as in the January litigation in this controversy, the leading factor is the strength of the plaintiffs' case on the merits. While this Court has not heard a full trial on the merits, and has not received a full administrative record, there has been a very extensive presentation of evidence, particularly of the documents which entered into the Secretary's decision to impose the fifty-cents per hundredweight deduction. This evidence clearly indicates the merits of the plaintiffs' and plaintiffs-intervenors' case.

If this matter were to proceed to a full trial on the merits, the defendants could undoubtedly augment the record.

This Court, however, has grave doubts that the defendants could produce evidence which would counter the strong showing which the plaintiffs have made that the Secretary has imposed this deduction requirement through a course of action which involves serious violations of the law. The determination is therefore a nullity.

Because of the importance which I give to the plaintiffs' showing on the merits, I will turn to this matter first. I would emphasize however, that I believe that the plaintiffs' showing on each of the four factors involved in the determination of the injunction question is quite strong.

III.

REVIEWABILITY

The Administrative Procedure Act, 5 U.S.C. § 701(a) renders administrative actions reviewable subject to two narrow exceptions:

> This chapter applies, according to the provisions thereof, except to the extent that--
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

The defendants argue that the Secretary's action taken under § 101 of the Omnibus Budget Reconciliation Act, now 7 U.S.C. § 1446(c) & (d), is unreviewable because

of 7 U.S.C. § 1429.[3/]

To establish unreviewability, the defendant must carry a heavy burden. The case law requires proof of unreviewability by clear and convincing evidence. Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Citizen to Preserve Overton Park, Incorporated v. Volpe, 401 U.S. 402 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 139 (1967); Rusk v. Cort, 369 U.S. 367-80 (1962); Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955); Heikkila v. Barber, 345 U.S. 229 (1953); National Corn Growers Association v. Bergland, 471 F. Supp. 1199, 1205-06

3/ That section provides:

> Determinations made by the Secretary under this Act shall be final and conclusive; Provided, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

(S.D. Iowa 1974), app. dismissed, 611 F.2d 730 (8th Cir. 1980). The construction of statutes under which an agency claims its actions are unreviewable is a question for the courts rather than the administrative agency. Barlow v. Collins, 397 U.S. 159, 165 (1970), see also Texas Gas Transmission Corporation v. Shell Oil Company, 363 U.S. 263, 268-70 (1960); Hardin v. Kentucky Utilities Company, 390 U.S. 1, 14 (1968) (Harlan, J., dissenting). Preclusion must appear on the face of the act, and cannot be established from a mere failure to specifically allow review. Dunlop v. Bachowski, supra; Citizens to Preserve Overton Park, supra; Wirtz v. Bottle Blowers Association, 389 U.S. 463, 468 (1968); Abbott Laboratories v. Gardner, supra; National Corn Growers Association,

supra; Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., 212, 275, quoted in Heikkila v. Barber, supra, 345 U.S. at 232. Ambiguous language referring to "finality" will be construed as designating administrative finality and ripeness for review rather than preclusion of judicial review. Johnson v. Robinson, 415 U.S. 361 (1974); Harmon v. Brucker, 355 U.S. 579 (1958); Shaughnessy v. Pedreiro, supra; Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977); Arlington Oil Mills, Incorporated v. Knebel, 543 F.2d 1092, 1098-99 (5th Cir. 1976). By contrast, the generous provisions granting reviewability are to be hospitably construed. Dunlop v. Bachowski, supra; Abbott Laboratories v. Gardner, supra; Shaughnessy v. Pedreiro, supra; cf. American School of Magnetic

Healing v. McAnnulty, 187 U.S. 94 (1902). Particularly where the party seeking review is the beneficiary of the statute in question, there is a strong presumption that Congress intended reviewability to insure that its statutory objectives would be realized. Barlow v. Collins, supra, 397 U.S. at 167; see also id. 397 U.S. at 174-75 (separate opinion of Brennan, J.).

The intent of the Congress which enacted 7 U.S.C. § 1429 is an academic question.4/ The Congress which enacted the Omnibus Budget Reconciliation Act of 1982 unquestionably did not intend

4/ Two courts have spoken to its finding reviewability. Ganzaley v. Greeman, 334 F.2d 570 (D.C. Cir. 1964); National Corn Growers Association v. Bergland, 471 F. Supp. 1199, 1205-06 (S.D. Iowa 1974); appeal dismissed, 611 F.2d 730 (8th Cir. 1980), vacated on other grounds, 484 F.Supp. 1342 (S.D. Iowa 1980).

to make action under § 101 thereof unreviewable.5/ Paragraph (d)(6)(A)

5/ Section 101, paragraph (d)(6) states:

> (6)(A) The district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any provision of this subsection or any regulation issued under this subsection. Any such civil action authorized to be brought under this subsection shall be referred to the Attorney General for appropriate action. Nothing in this subsection may be construed as requiring the Secretary to refer to the Attorney General minor violations of this subsection whenever the Secretary believes that the administration and enforcement of this subsection

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of § 101 grants the Secretary access to this Court for actions to prevent and

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would be adequately served by suitable written notice or warning to any person committing such violation.

(B) Any person who willfully violates any provision of this subsection or any regulation issued under this subsection, or who willfully fails or refuses to remit any amounts due thereunder shall be liable, in addition to payment of the full amount due plus interest, for a civil penalty (to be assessed by the Secretary) of not more than $1,000 for each such violation which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

(C) The remedies provided in subparagraphs

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restrain any violation of § 101 of the Omnibus Budget Reconciliation Act. There is no evidence Congress intended this Court to re entertain such actions while precluded from inquiring into their legality of the underlying deduction. Paragraph (d)(6)(B) creates a quasi-criminal action for violation of the deduction plan. There is no evidence that Congress intended this Court to entertain such while precluded from examining the legality of the regulation being violated. Paragraph (6)(c) unequivocally indicates the availability of equitable remedies.

A long-established canon of statu-

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(A) and (B) shall be in addition to, and not exclusive of, remedies otherwise provided at law or in equity.

tory construction requires that this Court construe § 101 of the Omnibus Budget Reconciliation Act as a whole. Weinberger v. Hynson, Westcott & Dunning, Incorporated, 412 U.S. 609, 633-34 (1973); Federal Trade Commission v. Manager, Retail Credit Company, 515 F.2d 645, 652-53 (4th Cir. 1974); D'Antoni, Incorporated v. Great Atlantic & Pacific Tea Company, 496 F.2d 1378 (5th Cir. 1974); City of New York v. Train, 494 F.2d 1033, 1049-50 (D.C. Cir. 1974), aff'd. 420 U.S. 35 (1975); U.S.V. Pharmaceutical Corporation v. Richardson, 461 F.223, 227 (9th Cir. 1972), aff'd. 412 U.S. 655 (1973); United States v. Hunter, 459 F.2d 205, 210-11 (4th Cir.), cert. denied, 409 U.S. 934 (1972), reh'g denied, 413 U.S. 923 (1973); Cardno v. Finch, 311 F.Supp. 251 (E.D. La. 1970).

As applied to § 101 of the Omnibus Budget Reconciliation Act, this principal requires that the availability of equitable remedies be extended to all portions of that section, now codified at 7 U.S.C. § 1446(C) & (d).

Additionally the determination by the Secretary which is the subject of this action, 48 Fed. Reg. 11,253 (March 17, 1983), replaces of the earlier determination of September 24, 1983, 47 Fed. Reg. 42,128 (1982). Collection of the determination of September 24, 1982 was enjoined by this Court's Order of January 11, 1983. Because of the relationship between this action and this Court's Order of January 11, this Court has the power to review the Secretary's determination as part of its inherent contempt power.

* * * the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof.

In re Debs, 158 U.S. 564, 594-95 (1895).

This Court finds its inherent power quite sufficient to sustain its review of the Secretary's determination. Shillitani v. United States, 384 U.S. 364, 370-71 (1966); McComb v. Jacksonville Paper Company, 336 U.S. 187, 193 (1949); Penfield Company v. Securities and Exchange Commission, 330 U.S. 585, 593-94, reh'g. denied, 331 U.S. 865 (1947); Ex parte Robinson, 86 U.S. (19 Wall.) 505 (1873); United States v. Fidanian, 465 F.2d 755, 757-58 (5th Cir.), cert. denied, 409 U.S. 1044 (1972); United States v. Dickinson, 465 F.2d 496, 510 (5th Cir. 1972); In re Russo, 53 F.R.D. 564, 573 (C.D. Cal. 1971); In re Williams, 306 F.Supp. 617

(D.D.C. 1969); Rhodes v. Houston 202 F.Supp. 624, 630 (D. Neb.) aff'd 309 F.959 (8th Cir. 1962).

This Court concludes that the actions of the defendant Secretary under § 101 of the Omnibus Budget Reconciliation Act, now 7 U.S.C. §§ 1446(c) & (d) are judicially reviewable.

IV.

COMPLIANCE WITH THE ORDER OF JANUARY 11, 1983

The defendants may regard the mention of the contempt power as mere ritual invocation. In the Motion to Stay filed with the United States Court of Appeals for this circuit, the defendants assert:

> We are unaware of any indication in the record or elsewhere that the Secretary

> will refuse to obey the final decision by the courts regarding this program.

Defendants' Motion for an Immediate Stay Pending Appeal And, In The Alternative, A Petition for a Writ of Mandamus at 18.

This Court, however, has a very serious question: have the defendants, in good faith obeyed the final decision of the courts regarding their program of September-January, 1982. In this Order of January 11, 1983, this Court summarized its conclusions of law, saying:

> a) The Secretary's "determination" imposing the deduction was substantive rule-making, and thus came within the purview of 5 U.S.C. § 553.
>
> b) The Department of Agriculture has waived the "benefits" excep-

> tion, and thus cannot take advantage of the exemption of 5 U.S.C. § 553(a)(2).
>
> c) There was no "good cause" which would excuse the Secretary from the notice and comment requirements of 5 U.S.C. § 553(b(B).

Order at 45-46, 558 F.Supp. at 1022.

The Notice of Determination for 1982-83 Milk Price Support Program, 48 Fed. Reg. 11,253 (Mar. 17, 1983), announced a deduction requirement legally identical to that voided by the Order of January 11, 1983. The record shows that it is normal Department procedure that all material for publication in the Federal Register is reviewed by the General Counsel of the Department of Agriculture before publication. See Hearing of April

12-14, Tr. 276 (Shaw); Transcript of Preliminary Injunction Proceedings, Jan 3, 1983, Tr. 219-20, testimony of Dr. Charles N. Shaw responding to questions by the Court.

Over the signature of the defendant Secretary of Agriculture there appears the statement:

> The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) is not applicable to this notice of determination since CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this notice. While the Secretary of Agriculture has determined that CCC will voluntarily comoly with the provisions of 5 U.S.C. 553(b) and (c), the Regulatory Flexibility Act does not

> apply in the case of voluntary agency compliance with proposed rulemaking requirements.
>
> 48 Fed. Reg. at 11,253. (emphasis added).

This statement indicates that the Secretary's compliance with the notice and comment requirements of 5 U.S.C. § 553 is not required, is voluntary. This issue was fully discussed in this Court's Order of January 11. See Order, esp. 12-49, 558 F.Supp. at 1010-22. The question of whether or not the Secretary was required to adhere to the notice and comment requirements of 5 U.S.C. § 553 was resolved emphatically against the defendants. The Secretary is required to comply.

This Court has discovered only one item expanding on this statement of the

Secretary's power to dispense with the rulemaking requirements of 5 U.S.C. § 553. This is an introductory phrase to a headnote and a footnote to the headnote in the defendants' Memorandum to this Court, filed April 11, 1983. The headnote begins:

> Assuming That The APA Procedural Requirements Are Applicable, . . .
>
> Defendants' Memorandum at 34.

The footnote reads:

> In opposing the initial motion for a preliminary injunction, defendants took the position that the rulemaking requirements of the APA were inapplicable to the Secretary's September 24, 1982, determination implementing the 50 cent deduction because it "related to" a "grant" or "benefit" under 5 U.S.C. § 553(a)(2).

Defendants also argued that although former Secretary of Agriculture Clifford M. Hardin had announced on July 20, 1971, that the Department would as a "matter of policy" voluntarily utilize the APA's notice and comment procedures, such a policy statement did not constitute binding law.

The defendants have not abandonded these positions and accordingly incorporated herein by reference those arguments. See Defendants' Memorandum Of Points and Authorities in Opposition to Motion for Preliminary Injunction, pp. 29-34. However, in view of the uncontroverted facts set out below showing that the Secretary has fully and literally complied with the APA's rulemaking requirements, with regard to the determination to impose the 50-cent deduction

> as of April 16, and because the Secretary has decided to make no attempt to seek legal approval to collect the deduction based on the September 24, 1982 determination, the Secretary does not urge those arguments at this juncture.
>
> Defendants' Memorandum, footnote at 34.

In the Order of January 11, 1983, this Court addressed the position advanced in the above-quoted footnote, at 14-20, 558 F.Supp. 1010-13. This material speaks with sufficient force and clarity that I reproduce a substantial portion verbatim:

> [beginning of quotation]
>
> [T]he Administrative Conference of the United States recommended that agencies afford the public the opportunity to participate in rule-making bearing

on matters mentioned in 5 U.S.C. § 553(a)(2), the exemptions of that provision notwithstanding. On July 24, 1971, the Secretary of Agriculture published an announcement that, effective that date, the Department of Agriculture would follow the requirements of 5 U.S.C. § 553(b) and (c). 36 Fed. Reg. 13,804 (July 24, 1971).5/

In their brief, the defendants contend that this was merely a voluntary undertaking, a general statement of policy, which "does not impose any rights and obligation. . . ." Defendants' Memorandum of Law at 33, quoting Texaco

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6/ The Secretary did state that the Department would continue to use the "good cause" exceptions provided by 5 U.S.C. § 553(b)(B), but pledged that the Department would use these sparingly, only when there was substantial basis for their use, and observing full procedural formalities involved in their use. 36 Fed. Reg. 13,804 (July 24, 1971).

Inc. v. Federal Power Commission, 412 F.2d 740, 744 (3d Cir. 1969).

While a general statement of policy does not impose rights or obligations, I find that the waiver made by the Secretary of Agriculture in 1971 does create rights and obligations. Thus, as with the Notice of Determination in the instant case, it is the substance of the Secretary's action rather than the label given his action which controls. Columbia Broadcasting Systems, Inc. v. United States, supra; Cerro Metal Products v. Marshall, 620 F.2d 964, 981 (3d Cir. 1980); Brown Express, Inc. v. United States, 607 F.2d 695, 700 (5th Cir. 979); Lewis-Monta v. Secretary of Labor, 469 F.2d 478, 481 (2d Cir. 1972); Texaco, Inc. v. Federal Power Commission, 412 F.2d 740, 744 (3d Cir. 1969); City of

New York v. Diamond, 379 F. Supp. 503, 518 (S.D.N.Y. 1974); Pharmceutical Manufactures Association v. Finch, 307 F. Supp. 858, 863 (D. Del. 1970).

The substantive impact of 36 Fed. Reg. 13,804 (1971), was decided by the District of Columbia Court of Appeals in the case of Rodway v. United States Department of Agriculture, 514 F.2d 809 (D.C. Cir. 1975). Therein, Judge J. Skelly Wright stated:

> On July 24, 1971, however, as a result of a recommendation of the Administrative Conference of the United States, USDA promulgated a regulation making the procedural requirements of Section 4 of the APA [5 U.S.C. § 533] applicable to all of its rule-making relating to 'public property, loans, benefits, or contracts.' The regulation was effective

> immediately. 36 Fed. Reg. 13,804. It is of course, well settled that validly issued administrative regulations have the force and effect of law [Citations omitted.] Thus, the regulation fully bound the Secretary to comply thereafter with the procedural demands of the APA.
>
> 514 F.2d at 814.

While the defendants contend that the holding and the reasoning of Rodway is in error, it is endorsed by courts in the Second,[7] the Third,[8] the Fifth,[9] and the Ninth

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7/ Tyson v. Maher, 523 F.2d 972, 975 n.6 (2d Cir. 1975)

8/ Reyes v. Klein, 411 F.Supp. 1241 (D.N.J. 1976).

9/ Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092 (5th Cir. 1976); see also Crown Zellerbach Corporation v. Marshall, 441 F.Supp. 1110, 1119 (E.D. La. 1977)(similar waiver of § 553(a)(2)

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Circuits,10/ and the defendants have cited no case in which a court has rejected Rodway.

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10/ Anderson v. Butz, 428 F.Supp. 245, 249 (E.D. Cal. 1975), aff'd 550 F.2d 459 (9th Cir. 1977).

I also draw the parties' attention to the recent case of Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982). Therein at page 356, footnote 4, the court said:

> The Administrative Procedures (sic) Act is applicable to rulemaking by the Secretary of Health and human Services. Although 5 U.S.C. § 553(a)(2) would have exempted the rule making procedure now in dispute, the then Secretary of Health Education and Welfare, in a policy statement dated January 28, 1971, (36 Fed Reg. 2532), required all agencies utilize the public participation and officers in his department to procedures of § 553. The Secretary does not contest his legal obligation to comply with § 553 procedures.
>
> [emphasis added]

Accord, Lewis v. Weinberger, 415 F.Supp. 652 (D.N.M. 1976).

The defendants concede that the 1971 announcement must be regarded as "an announcement of how an agency may be expected to exercise discretion which it possesses (Defendants' Memorandum of Law at 33). Counsel for the defendants acknowledge that the proper course for the Secretary to withdraw from the 1971 position, should the Secretary be determined to do so, is to announce a new position with respect to the Administrative Procedure Act requirements and thereby warn those affected of the new policy. Such a new policy will have sweeping ramifications and impact on the lives of many people. It is manifestly unfair for the defendants to announce it in a way that does not give notice to those who are

affected, such as in briefs in litigation.

[end of quotation]

Order at 17-20, 558 F.Supp. 1010-13 [footnotes renumbered].

The defendants' failure to acknowledge the existence of this portion of this Court's Order notwithstanding, this Court's Order as quoted above was the final decision by the courts as to the "grant or benefit" exception to 5 U.S.C. § 553 before their Memorandum was filed with this Court. The time for appeal challenging this Court's Order of January 11, 1983 expired on March 14, 1983, the first business day after the 60th day after the filing of this Court's Order. See Fed. R. App. P. 4(a)(1). The defendants did not appeal this Court's Order of January 11. With the expiration

of the appeal period, the Order of January 11, 1983 became the law of the case. The Notice of Determination was published on March 17, 1983, and the defendants' Memorandum was filed with this Court on April 11, 1983.

It appears from the announcement above that the defendants concede that they cannot collect moneys which would have been due under the deduction requirement imposed September 24, 1982, but regard as untouched their position that the Administrative Procedures Act is not applicable to the Secretary's attempts to impose these deduction requirements. The Court cannot overlook the virtual identity of language in the announcements of September 24, (47 Fed. Reg. 42,129 and 47 Fed. Reg. at 42,112), of November 30, 1982 (47 Fed. Reg.

53,831) and of March 17, 1983 (48 Fed. Reg. 11,253). See Order at 9, 11 & n.5, 558 F.Sup. at 1009-10 & n.5. This Court's Order of January 11 was not restricted to the specific question of the deduction at issue.

The Secretary's compliance with 5 U.S.C. § 553 is mandatory. If the Order can be given a contrary reading it is by a path of reasoning this Court has not yet discerned.

The law of the case controls. This proposition needs no citation of authority. If there is authority to the contrary -- that is, authority allowing the defendants, at their discretion, to ignore a final order of the courts -- this Court has not yet found it. If such authority exists, and if the defendants adhere to this position, this Court

expects they will elevate the discussion to a fullness and dignity greater than a footnote.

This Court finds as a fact that the statement contained in the Notice of Determination of March 17, 1983 stating that "the CCC is not required by 5 U.S.C. § 553 or any other provision of law to publish a notice of rulemaking with respect to the subject matter of this Notice" and the restatement of that position in the footnote to their Memorandum cannot be read except as a refusal to obey of this Court's Order of January 11, 1983.

The defendants declare that they have met the requirements of the Administrative Procedure Act. If this were so, this Court would face a difficult choice. I would have to decide if the challenge

to this Court's authority is so offensive as to taint any rulemaking in which it was voiced.

Fortunately such choice thrust upon the Court. I find that the Secretary has not met the requirements of the Administrative Procedure Act. Even if this Court could overlook the challenge to its authority, the Secretary's attempted rulemaking is so flawed that it cannot stand.

V.

SCOPE OF REVIEW

In this case, the key legal issues is the scope of this Court's review. Although the defendants do not provide any clear exposition of this topic, by various comments throughout their Memorandum, they indicate that they believe

this case involves question on which this Court is confined to a very restricted review.[11] Although the defendants do

11/ There is no discrete discussion in the defendants' Memorandum which specifically addresses the question of the scope of review. Having reviewed the defendants' memorandum, I believe the following quotations are an accurate indication of the defendants' position on this question. Citations are omitted from these quotations.

> The scope of this review is narrow. . . . The Court's function on review is simply to ensure that a rational basis exists for the Secretary's decision.
>
> Defendants' Memorandum at 43.
>
> [T]his Court's review of the Secretary's decision in a case such as this is limited to ascertaining whether he has provided an adequate explanation of the reasons for imposing the deduction.

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delineate their position, it appears that they regard this as a case in which this Court is reviewing a factual judgment made by the Secretary.

This Court takes a different view. The fundamental question under review is not one of facts, but of law: what is the proper construction of § 101 of the Omnibus Budget Reconciliation Act of 1982. It is axiomatic that the review of conclusions of law, such as questions of

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Id. at 51.

> This Court's role is limited to . . . determining whether the Secretary has supplied adequate reasons and explanations for his decision to permit the Court to review the underlying rationality of his action.

Id. at 56.

statutory interpretation, is under standards different from the review of findings of fact. The Supreme Court in Citizen to Preserve Overton Park, Incorporated v. Volpe, 401 U.S. 402 at 415 (1971), noted this distinction, beginning its analysis of the scope of review by saying:

> The court is first required to decide whether the Secretary acted within the scope of his authority. Schilling v. Rogers, 363 U.S. 666, 676 (1960). This determination naturally begins with a delineation of the scope of the Secretary's authority and discretion. L. Jaff, Judicial Control of Administrative Action 359 (1965).

Similarly, the controlling statute, 5

U.S.C. § 706[12/] indicates that questions of law are handled differently than

12/ §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

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questions of fact. The opening sentence of that section to the courts, specifically reserves questions of statutory interpretation and under § 706(2)(c), this Court is to "hold unlawful and set aside agency . . . conclusions found to be -- in excess of statutory jurisdic-

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> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

tion, authority, or limitations."

In reviewing an administrative agency's interpretation of a statute, the agency's view is entitled to some deference. National Labor Relations Board v. Bell Aerospace Company, 416 U.S. 267, 275 (1974); Zuber v. Allen, 396 U.S. 168, 192-93 (1969); Udall v. Tallman, 380 U.S. 1 (1965); Patagonia Corporation v. Board of Governors of the Federal Reserve System, 517 F.2d 803 (9th Cir. 1975). The final determination of question of law, however, remains for this Court, which although it may adopt the agency's interpretation, is not required to do. Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 272 (1968); Estate of Sanford v. Commissioner, 308 U.S. 39, 52 (1939); Western Coal Traffic League v. United

States, 694 F.2d 378, 383-84 (5th Cir. 1982); Patagonia Corporation v. Board of Governors, supra, 517 F.2d at 812; Beryllium Corporation v. United States, 449 F.2d 362, 366 (Ct. Cl. 1971); Sunstrand Turbo v. United States, 389 F.2d 406, 411 (Ct. Cl. 1968); First National Bank in Billings v. First Bank Stock Company, 306 F.2d 937, 941 (9th Cir. 1962); United States v. Ekberg, 291 F.2d 913, 921-22 (8th Cir.), cert. denied, 368 U.S. 920 (1961); General Railway Signal Company v. Washington Metropolitan Area Transit Authority, 527 F.Supp. 359 (D.D.C. 1979), aff'd. 664 F.2d 296 (D.C. Cir. 1980); cf. Danks v. Fields, 696 F.2d 572, 575-76 (8th Cir. 1982) (interpretation of a document is a question of law reserved for the courts); Crowder v. United States, 255 F.Supp. 873 (N.D. Cal. 1964),

aff'd. 362 F.2d 1011 (9th Cir. 1964) (same).

In construing statutes, it is the intent of the Congress which must control, not the views of either the agency or the courts. Southeastern Community College v. Davis, 442 U.S. 397, 411-12 (1979); Securities & Exchange Commission v. Sloan, 436 U.S. 103, 118 (1978); United States v. Larinoff, 431 U.S. 864, 874 & n.12 (1977); Federal Maritime Commission v. Seatrain Lines, Incorporated, 411 U.S. 726, 745-46 (1973); Volkswagenwerk Aktiengesellschaft, supra, 390 U.S. 261, 272; National Labor Relations Board v. Brown, 380 U.S. 278, 291 (1965); Western Coal Traffic League, supra; Greater Boston Television Corporation v. Federal Communications Commission, 444 F.2d 841, 850 (D.C. Cir. 1970), cert.

denied, 403 U.S. 923 (1971); Committee for Independent P-I v. Smith, 549 F.Supp. 985 (W.D. Wash 1982); University of Richmond v. Bell, 543 F.Sup 321 (E.D. Va. 1982); Union Oil Company of California v. United States Department of Energy, 530 F.Supp. 717 (C.D. Cal. 1982). In the area of statutory construction, administrative agencies hold no special expertise as against the courts. Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 31-32 (1981); Barlow v. Collins, 397 U.S. 159, 166 (1970); Western Coal Traffic League, supra, 694 F.2d at 383-84. This is particularly so when the statute in question is, as is § 101 of the Omnibus Act, legislation defining the outer limits of the agency's powers. As the Supreme Court said in Social Security

Board v. Nierotko, 327 U.S. 358, 369 (1945), "An agency may not finally decide the limits of its statutory power. That is a judicial function." See also Western Coal Traffic League, supra, 694 F.2d at 384.

This rule of judicial control rests on the realization that the construction of controlling statutes is frequently a process ripe with policymaking considerations, and policymaking remains preeminently a congressional, not an administrative task. American Ship Building Company v. National Labor Relations Board, 380 U.S. 300, 318 (1965); Hi-Craft Clothing Company v. National Labor Relations Board, 660 F.2d 910, 915 (3d Cir. 1981).

Thus, while this Court should give a certain deference to the construction

which the Secretary has given § 101 of the Omnibus Budget Reconciliation Act, where this court is "convinced that a certain reading, or application, of the statute is the correct -- or the only faithful -- reading or application, [this Court] should intervene and so declare." L. Jaffe, Judicial Control of Administrative Action 572 (1965).

The deference which is due to an administrative construction of a statute varies with the factual circumstances of each case. In this case, this Court finds absent of the factors which would call for deference to the Secretary's construction. This is an entirely new statute, authorizing an unprecedented program, so that there has been no long-standing congressional acquiescence. Cf. International Brotherhood of Teamsters v.

Daniel, 439 U.S. 551, 566 n.20 (1979); Hi-Craft Clothing Company, supra, 660 F.2d at 916. The Department of Agriculture did not play a controlling role in shaping this legislation. Indeed, the Secretary has described the enactment of this statute as a defeat in Congress. See Dairy Policy Statement by Agriculture Secretary John R. Block, 4, 8, 10 (March 16, 1983); cf. Ford Motor Credit Corporation v. Milhollin, 444 U.S. 555 (1980); Hi-Craft Clothing Company, supra. Further, the matters at issue in the construction of this statute are matters of general legislative policy rather than matters close to the everyday administration of the Department's program. Cf. Process Gas Consumers Group v. United States Department of Agriculture, 694 F.2d 778, 791-92 (D.C. Cir. 1982); Mid-

Louisiana Gas Company v. Federal Energy Regulatory Commission, 664 F.2d 530, 534-35, reh'g. denied, 669 F.2d 729 (5th Cir. 1981). Finally, the implementation of this statute represents a significant change in Department policy. That a policy is in flux makes it all the more important that statutory construction be left to the courts. Greater Boston Television Corporation, supra, 444 F.2d at 352; Marine Space Enclosures, Incorporated v. Federal Maritime Commission, 420 F.2d 577, 585 (D.C. Cir. 1969); New Castle County Airport Commission v. Civil Aeronautics Board, 371 F.2d 733, 735 (D.C. Cir. 1966, cert. denied, 387 U.S. 930 (1967).

Finding an absence of factors which would tend to favor deference to the agency's interpretation, and the presence

of factors which caution against such deference, this Court concludes that the construction of this statute is a task for this Court rather than for the defendants. National Labor Relations Board v. Hearst Publications, Incorporated, 322 U.S. 111, 130-31 (1944); Western Coal Traffic League, supra, 694 F.2d at 383-84; Charter Limousine, Incorporated v. Dade County Board of Commissioners, 678 F.2d 586, 588 (5th Cir. 1982); H. W. Wilson Company v. United States, 580 F.2d 33 (2d Cir. 1978).

Finally, this Court's review of findings of fact determined by the Secretary is not so deferential as the defendants appear to believe. While this Court is not to substitute its judgment for that of the administrative agency in matters of fact-finding, review is not to

be a rubber stamp. This Court is required to give a "thorough, probing, in-depth review" to insure that all relevant factors have been considered. Citizens to Preserve Overton Park, supra 401 U.S. 415, 416; accord, Bowman Transportation Incorporated v. Arkansas Best Freight System, Incorporated, 419 U.S. 281, 285-86 (1974); Wawszkiewicz v. Department of Treasury, 670 F.2d 296, 301 (D.C. Cir. 1981); Environmental Defense Fund, Incorporated v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981); Diplomat Lakewood, Incorporated v. Harris, 613 F.2d 1009, 1018 (D.C. Cir. 1979); Home Box Office, Incorporated v. Federal Communications Commission, 567 F.2d 9, 34-36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); American Frozen Foods Institute v. Train, 539 F.2d 107, 133 (D.C. Cir.

1976); American Paper Institute v. Train, 539 F.2d 328, 338 (D.C. Cir.), cert. dismissed, 429 U.S. 967 (1976); Transcontinental Pipe Line Company v. Federal Power Commission, 488 F.2d 1325, 1329 (D.C. Cir. 1973); Medical Committee for Human Rights v. Securities & Exchange Commission, 432 F.2d 659, 675 (D.C. Cir. 1970); Michigan Consolidated Gas Company v. Federal Power Commission, 283 F.2d 204, 226 (D.C. Cir.), cert. denied, 364 U.S. 913 (1960); Aeron Marine Shipping Company v. United States, 525 F.Supp. 527, 535 (D.D.C. 1981).

With these principles in mind, I turn to the construction of the statute at issue in this case, § 101 of the Omnibus Budget Reconciliation Act, now codified as 7 U.S.C. §§ 1446(c) & (d).

VI.

STATUTORY CONSTRUCTION[13/]

In this case, the Secretary's action is clear. The legal basis for that action, however, has not been precisely defined. In imposing this deduction requirement, the Secretary apparently relies on a combination of statutory authority and discretionary power.

The Secretary of Agriculture is not a primary lawmaker. His role is fundamentally one of law implementing. The

13/ The defendants have brought to this Court's attention several opinions by other district courts in which the Secretary's action has been upheld. Of these, only one has dealt specifically with the administrative law issue, National Farmers' Organization v. Block, C.A. No. 82-C-1602 (E.D. Wis. Apr. 20, 1983). I have reviewed this decision, and find that the court therein apparently accepts without examination the construction which the defendants give to § 101 of the Omnibus Budget Reconciliation Act. Thus, I believe this Court is the first to undertake an examination of this issue.

Secretary is an agent, created by the Congress, delegated powers by the Congress, and charged with carrying out policies mandated by the Congress. Many of the Secretary's actions, of course, do have the force and effect of law, see e.g., Rodway v. United States Department of Agriculture, 514 F.2d 809 (D.C. Cir. 1975), but in his actions, the Secretary must draw authority from legislative delegation. He must implement the intent of the Congress. While the Secretary may draw on discretionary authority to carry out the intent of Congress, he does not have authority, discretionary or otherwise, to act outside that intent. His discretionary authority is interstitial to the legislative directive of the Congress, not independent thereof. United States v. Larionoff, 431 U.S. 864, 873 &

n.12 (1977); Dixon v. United States, 381 U.S. 68, 74 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369-70 & n.23 (1946), and cases cited therein; Manhattan General Equipment Company v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936); Insurance of North America v. Gee, 702 F.2d 411, 414 (2d Cir. 1983); Oliver v. United States Postal Service, 696 F.2d 1129, 1131 (5th Cir. 1983); Meade Township v. Andrus, 695 F.2d 1006-1009-10 (6th Cir. 1982); Union Oil Company of California v. United States Department of Energy, 530 F.Supp. 717, 724-25 (C.D. Cal. 1982); Brown v. Harris, 491 F.Supp. 845, 847 (N.D. Cal. 1980); Dickinson, Administrative Justice and Supremacy of Law 41 (1927); see also Greater Boston Television Corporation v. Federal Communications Commission, 444

F.2d 841, 851 (D.C. Cir. 1970); cf. Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498 (4th Cir. 1973), vacated on other grounds, 415 U.S. 36 (1975) (finding that agency inaction violated other statutory language); Ross v. Community Services, 396 F.Supp. 278 (D. Md. 1975) (same).

In this Court, the Secretary contends that his actions are taken pursuant to the mandate of Congress as expressed in § 101 of the Omnibus Budget Reconciliation Act of 1982, now 7 U.S.C. §§ 1446(c) & (d). While acknowledging that the Congress did not explicitly endorse every action which he has taken, the Secretary argues that the essence of his action is taken pursuant to § 101, with any action not specifically authorized therein based on the Secretary's

discretionary power to effectuate the intent of the Congress as expressed in that statute.

In taking this position, the Secretary gives a particular reading to paragraph (d)(2) of § 101, now codified as 7 U.S.C. § 1446(d)(2). It is the Secretary's view that Congress mandated that the Secretary save $60 million per month by imposing the deduction requirement. To carry out this mandate, the Secretary argues, Congress implicitly gave the Secretary plenary discretion as to his course of action: he could do whatever he felt was necessary to produce this savings. Under this reading of 7 U.S.C. § 1446(d)(2), the Secretary was free to disregard any other statute which he felt interfered with his course of action. See, e.g., Notice of Determination, 48

Fed. Reg. at 11,255 (1983); Def. Memo at 45-47.

Having reviewed the statutory language of 7 U.S.C. § 1446(d)(2), and § 101 of the Omnibus Budget Reconciliation Act in its entirety, and having also considered the history of that provision, this Court believes that it is far more reasonable to give subsection (d)(2) a more limited reading. Under this construction, the Congress delegated only limited authority to the Secretary. The Congress calculated that a deduction program, if implemented, would substantially reduce the cost of the dairy price support program. The Congress authorized the Secretary to initiate rulemaking procedures directed towards imposing the deduction requirements. The Congress expected the Secretary to implement this rulemaking.

The Congress also expected and intended that the Secretary would observe all existing legal restraints on his authority.

In construing this statute, therefore, this Court must decide whether the various sources showing the intent of the Congress point toward a grant of plenary discretion directed toward a single overriding financial goal or toward a right to initiate procedures within the confines of the existing statutory system surrounding milk price supports.

A. The Statutory Language.

The controlling source indicating the intent of the Congress is the statute itself. It is the statute, and not any interpretation thereof, which the Congress has enacted as law. Matala v. Consolidated Coal Company, 647 F.2d 427,

429 (4th Cir. 1981); Chicago Transit Authority v. Adams, 607 F.2d 1284, 1289 (7th Cir. 1979), cert. denied, 446 U.S. 946 (1980); Pettis ex rel. United States v. Morris-Knudsen Company, Inc., 577 F.2d 688, 672 (9th Cir. 1978) ("we assume Congress said what it meant and meant what it said"); Water Control Board v. Train, 559 F.2d 921, 924-25 n.20 (4th Cir. 1977); Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977); Carrier Corporation v. United States, 534 F.2d 244, 248-49 (Ct. Cl. 1976); Patagonia Corporation v. Board of Governors of the Federal Reserve System, 517 F.2d 803, 813 (9th Cir. 1975); Lykes Brothers Steamship Company, Inc. v. United States, 513 F.2d 1342, 1349 (Ct. Cl. 1975); Dupuy v. Dupuy, 511 F.2d 641 (5th Cir. 1975); Frankfurter, Some Reflections on the

Reading of Statutes, 47 Colum. L. Rev. 527, 535-38 (1947).

The statutory provision on which the Secretary relies, § 101 of the Omnibus Budget Reconciliation Act, is now codified as 7 U.S.C. §§ 1446(c) & (d). Because several of the provisions of this section are not germane to this discussion, I begin by outlining this statutory material.

(c) general guidelines of the price support system.

(d) "Notwithstanding any other provision of law."

(1)(A) Support price will be $13.10.

(B) Support price will be readjusted in 1984.

(C) Prices shall be supported by milk purchases.

(2) The first 50-cent deduction is authorized.

(3)(A) The second 50-cent

deduction is authorized, but with a base period.

(B) Refund system.

(C) Amount of surplus limits on the second deduction.

(D) Period for refunds.

(4) Deductions collected are to be remitted to the CCC.

(5) Farmers to keep records and Secretary to have general investigatory power.

(6)(A) Courts to hear enforcement actions.

(B) Civil fine for willful violation.

(C) Non-exclusivity of judicial relief.

(7) Secretary to cooperate with existing programs.

This Court finds that a construction of this statute requires specific consideration of seven parts of this action: (c), (d), (d)(1)(A), (d)(1)(B), (d)(1)(C), (d)(2), and (d)(3)(A).

(c) The price of milk shall be supported at

such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. Such price support shall be provided through the purchase of milk and the products of milk.

(d) Notwithstanding any other provision of law --

(1)(A) Effective for the period beginning October 1, 1982, and ending September 30, 1984, the price of milk shall be supported at not less than $13.10 per hundred-weight of milk containing 3.67

per centum milkfat.

(B) Effective for the fiscal year beginning October 1, 1984, the price of milk shall be supported at not less than such level that represents the percentage of parity that the Secretary determines $13.10 represented as of October 1, 1983.

(C) The price of milk shall be supported through the purchase of milk and the products of milk.

(2) Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundred-weight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price

support program. Authority for requiring such deductions shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should estimate that such net price support purchases during that fiscal year would be less than 5 billion pounds, the authority for requiring such deduction shall not apply for the balance of the year.

(3)(A) Effective for the period beginning April 1, 1983, ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundred-weight, in addition to the deduction referred to in paragraph (2), from the proceeds of sale of all milk

marketed commercially by producers to be remitted to the Corporation. The deduction authorized by this subparagraph shall be implemented only if the Secretary establishes a program whereby the funds resulting from such deductions would be refunded in the manner provided in this paragraph to producers who reduce their commercial marketings from such marketings during the base period. For the purpose of from of this paragraph, the base period shall be the fiscal year beginning October 1, 1981, or at the option of the Secretary, the average of the two fiscal years beginning October 1, 1980. The Secretary may make such adjustments in individual bases under this subparagraph as the Secretary determines necessary to correct for abnormal factors as the Secretary determines should be

considered in determining a fair and equitable base.

B. The Congressional Budget "Line-Item".

Throughout these proceedings, the Secretary has placed great weight on the fact that the Congress counted the money that could be recovered from these deductions as already having been saved. See e.g., Secretary's press statement, at 1, 4 (March 16, 1983); see also Hearing of January 3, 1983, Tr. 158 (Shaw).

These savings are nowhere mentioned in § 101 of the Omnibus Budget Reconciliation Act. The Congress took credit for these savings apparently by entering a "line-item" in a congressional budget resolution. The precise location and amount of this "line-item" has not been brought to this Court's attention. The defendants also have not specified which

budget resolution it occurs in, whether the preliminary or a later resolution. The defendants have not indicated whether the savings called for can be achieved through the implementation of the first 50-cent deduction alone or would require the implementation of both deductions. The Congressional Record suggests that it was nothing more than a Congressional Budget Office projection assuming both deductions and not based on current production data. It appears to have been less a studied mandate than a hypothetical arithmetic projection. See 128 Cong. Rec. S. 10770 (reading of conference report); 128 Cong. Rec. H. 6362 (statement of Rep. Jeffords).

A review of the Congressional Budget Act, 2 U.S.C. §§ 621 et seq., shows that in the budget process the Congress adopts

a series of budget resolutions. These resolutions are not statutes. They do not have the force and effect of statutes. They are never formally presented to the President, and they become effective without his approval. For many purposes they are very important, but they do not and they cannot repeal a statute. See H. Rep. No. 658, 93 Cong., 2d Sess., reprinted in 1974 U.S. Code, Cong. & Ad News 3462; Conf. Rep. No. 924, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 3591.

This Court also notes that the Congress has not modified 7 U.S.C. § 1733, which guarantees an open appropriation for the Commodity Credit Corporation.

The Court finds that there is nothing in the adoption of the "line-item" in a congressional budget which would neces-

sarily authorize any action by the Secretary not consistent with the provisions of the United States Code, including but not limited to the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and 7 U.S.C. §§ 1421(b) and 1441(a), 1446(c), and 1446(b).

This Court further finds that the adoption of a "line-item" in a congressional budget resolution is entirely consistent with a reading of § 101 as authorizing the Secretary to initiate procedures to impose the deduction requirements as specified in that statutory provision.

This Court further finds there is no credible evidence that the Congress intended, by entering a budget "line-item" to authorize the Secretary to exclude consideration of financial impact

to dairy farmers.

C. Section 101, Paragraph (c).

Turning then to the actual language of § 101, the first provision which is of significance is paragraph (c), now 7 U.S.C. § 1446(c).

This paragraph sets forth the factors which are to be considered in setting a support price for milk. Specifically, this paragraph states that the Secretary is to set a support price which inter alia will "reflect changes in the cost of production."

This is not a new provision. It has been part of the United States Code since at least 1973. By including it in § 101 of the Omnibus Budget Reconciliation Act, the Congress was plainly reenacting old legislation rather than enacting a new provision.

The reenactment of this language is meaningful only as a reaffirmation of these criteria as the appropriate guidelines in making price support determinations. Sound construction requires that this paragraph be read in this way to give it meaning.

The defendants apparently agree that 7 U.S.C. § 1446(c) establishes criteria which control the Secretary's discretion under § 1446(d). They would, however, read this statute ignoring the reference to cost of production. In their memorandum, the defendants quote this subsection, Defs'. Memo. at 5, but in the only substantive discussion in their argument, the defendants state: "The major goal of the [dairy price support] program is to promote the general welfare of the nation by assuring that enough milk is produced

to meet current needs and anticipate future needs. 7 U.S.C. § 1446(c)." Defs'. Memo at 46.

This Court finds that this reading of 7 U.S.C. § 1446(c) unsound, because it would render the phrase "reflect changes in the cost of production" a nullity. This Court finds that the plain meaning of this provision is that the Secretary, in making a price support determination, must consider the cost of production. The Secretary's construction would violate the axiom that a court should avoid a construction of a statute which renders any part thereof meaningless or insignificant. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973); United States v. Menasche, 348 U.S. 528, 538-39 (1955); Sunshine Coal Company v. Adkins, 310 U.S. 381, 392 (1940);

Washington Market Co. v. Hoffman, 101 U.S. 112, 115 (1940) (preferred construction requires that "no clause, sentence or word shall be superfluous, void or insignificant"); Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 970-71 (5th Cir. 1981); National State Bank of Elizabeth, New Jersey v. Smith, 591 F.223, 231 (3d Cir. 1979); Estate of Allen, 558 F.2d 14, 20-21 (Ct. Cl. 1977); Zeigler Coal Co. v. Kleepe, 536 F.2d 398, 406 (D.C. Cir. 1976); Patagonia Corporation v. Board of Governors of the Federal Reserve System, 517 F.2d 803, 813 (9th Cir. 1975); Marsano v. Laird, 412 F.2d 65, 70 (2d Cir. 1969); Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963); Uptagrafft v. United States, 315 F.2d 200, 204 (4th Cir., cert. denied, 375 U.S. 818 (1963) ("We shall not and do not

suppose that Congress intended to enact unnecessary statutory amendments").

D. Section 101, Paragraph (d)-(d)(1).

Section 1446(d) begins with the phrase "Notwithstanding any other provision of law --"

This is an ambiguous phrase, which must draw its meaning from the language which precedes and that which follows it. It is also, I believe, a reflection of the fact that this statute, assembled in the haste of conference committee discussions, when the minds of the Congress were largely distracted, was not drafted with great precision. See also 128 Cong. Rec. H. 6362 (statement of Rep. Jeffords) (Expressing concern of vagueness of language).

This phrase must be read within its context and draw its meaning from the

surrounding terms. There is nothing in the record or the legislative history which suggests that it means anything more than that the specific provisions of § 1446(d) are regarded as refinements on the existing price support system, to be administered consistently with the existing system. Two specific provisions of § 1446(d) specifically support this reading of this "notwithstanding" language: Paragraph (d)(6)(C) allows grievants the "remedies otherwise provided at law or in equity," and paragraph (d)(7) commends to the Secretary's use federal, state and local administrative systems.

If the "notwithstanding" clause is allowed to draw its meaning from the surrounding language, then paragraph (d)(1)(A) in effect instructs the Secretary of Agriculture as to the proper

answer he is to reach in setting the basic support price: consideration of the need to assure an adequate supply, the changes in the cost of production, and the need to meet future needs will result in a minimum support price level of $13.10.

This reading of this paragraph is consistent with the plain meaning of the language. It also challenges the Secretary's reading of paragraph (d)(2). The Congress has, in the past, set guidelines for the Secretary, as in paragraph (c), but has left final determination to the Secretary. Paragraph (d)(1)(A) restricts the discretionary power of the Secretary, since the Congress has made a determination which it has heretofore delegated to the Secretary. Congress presumably acted with a relatively consistent overall

intent throughout this section. Therefore, it is at least curious for the Secretary to contend that the Congress implicitly gave him a sweeping grant of discretion under some paragraphs of § 101 when under this paragraph it explicitly restricted his discretion.

Paragraph (d)(1)(B) likewise restricts the Secretary's discretion. He is required to reset the support level in October, 1984, to compensate for inflation during the intervening period. As with (d)(1)(A), this paragraph cannot be easily reconciled with the reading which the Secretary gives to this statute. First, as in paragraph (d)(1)(A), the Congress has clearly restricted the Secretary's discretion in setting the minimum support price level. While no specific dollars-and-cents figure is

given for the new support price, a formula is given which will yield an exact support price. The Secretary clearly does not have discretion to set the minimum support price at other than the figure which "represents the percentage of parity that the Secretary determines $13.10 represented as of October 1, 1983." This provision is again inconsistent with the reading which the Secretary would give to this statute because it shows clearly that in resetting support price levels in the future, the Secretary is to consider inflation. This, in turn, undercuts the reading which the Secretary would give to this section. It would require considerable inconsistency for the Congress to make such concerns as inflation mandatory with respect to one paragraph, while giving the Secretary

complete discretion to dispense with them with respect to another.

E. Section 101, Paragraph (d)(2).

The critical paragraph in this section is (d)(2), which authorizes the Secretary to impose the deduction which is the subject of this litigation. Three factors are to be noticed. First, the authorizing language is discretionary: "the Secretary may provide. . . ." See also Order at 23-24, 558 F.Supp at 1014. Second, the only specifically mentioned condition was that the anticipated surplus exceed five million pounds milk equivalent. Because of the longstanding history of surpluses far higher than this and the widespread expectation that the surplus would continue to increase, it is apparent that Congress expected this condition to occur. Third, beyond the

amount of the surplus, there is no explication of factors which the Secretary is to consider in determining whether there is or is not to be a deduction. The mention of the level of surplus production does not appear to this Court to be an exclusive criteria for deciding whether or not the deduction will be imposed. Rather, it is a condition precedent to the Secretary's authority; unless there is a surplus of at least the prescribed level, the Secretary cannot impose this deduction. This Court finds the exclusive mentioning of this factor, particularly in its context, no intent of by the Congress to make this the factor which the Secretary was to consider in deciding whether there would be a deduction.

The Memorandum which the defendants have filed with this Court clearly sug-

gests that they take a contrary position. Throughout the Memorandum, indeed throughout the defendants' entire handling of this action, there has been an implicit view that the impact of this program on dairy farmers is a factor which the Secretary was free to exclude from his consideration. This position is clearly implied from the following statement, quoted from the defendants' Memorandum to this Court at 58:

> To the extent that Intervenors' arguments are based on the financial impact resulting from the deduction, they are entirely without merit. Congress did not tell the Secretary that he should refrain from imposing the deduction because of such consequences. Rather, within certain other well-defined limits Congress left discretion to the Secretary. As

> long as the Secretary has remained within those limits and given adequate consideration to the congressional goals -- as he has -- he has not abused his discretion.

Passages expressing a similar view can be found at defendants' Memorandum 51, 56-57, 58, 60 and 62.

Having considered paragraph (d)(2) in the context of § 101, this Court finds that there is no explicit language contained in that paragraph which authorizes the Secretary to exclude impact to dairy farmers from his consideration.

This Court also finds that there is no necessary implication from paragraph (d)(2), read either in isolation or in the context of the entirety of § 101 of the Omnibus Budget Reconciliation Act, which indicates that the Secretary of

Agriculture should exclude impact from his consideration in deciding whether or not to impose the deduction requirement.

This Court finds additionally that there is nothing in the language of paragraph (d)(2) or in any necessary implication therefrom which limits the applicability of paragraph (c) or any part thereof in the implementation of this deduction requirement.

F. Section 101, paragraph (d)(3)(A).

This paragraph authorizes the second deduction, the deduction proposed but not implemented. Whether the Secretary's decision not to implement this provision can be reconciled with his claim that the first deduction "might as well have been" mandatory, I postpone momentarily. (Dairy Policy Statement by Agriculture Secretary John R. Block of (March 16,

1983)).

Further on in 7 U.S.C. § 1446(d)(3)(A) is language which does not appear in 7 U.S.C. 1446(d)(2), and is thus not directly connected with the first 50-cent deduction requirement. The final sentence of the paragraph provides: "The Secretary may make such adjustments in individual cases under this subparagraph as the Secretary determines necessary to correct for abnormal factors affecting production and to reflect such other factors as the Secretary determines should be considered in determining a fair and equitable base."

Although the language concerning adjustments is discretionary ("may" rather than "shall") Congress obviously intended the Secretary to consider fairness and equity. This explicit mention

of the fairness and equity of base periods raises a serious question: was the Secretary free to exclude such considerations entirely from the implementation of the first deduction requirement, the subject of this litigation? He was not required to implement refunds under 7 U.S.C. § 1446(d)(2), but the language of the statute does not suggest a grant of discretion to exclude fairness and equity. See also H.R. Rep. No. 97-687, 97th Cong., 2d Sess. at 8-11 (1982) (it was a goal of the House to have equity in any reduction program).

G. Section 101 and Other Statutory Provisions.

There is no language in 7 U.S.C. § 1446(c) or (d) explicitly repealing or narrowing any other provision of the United States Code. It is a firmly

recognized canon of statutory construction that repeal of existing provisions is not to be lightly implied. It is not enough that the new provision is not merely arguably in conflict with the old. There must be positive repugnance. United States v. Welden, 377 U.S. 95, 102-03, n.12 (1964); United States v. Borden, 308 U.S. 188, 198-99 (1939); Ely v. Velde, 451 F.2d 1130, 1134-35 (4th Cir. 1971); Fanning v. United Fruit Company, 355 F.2d 147 (4th Cir. 1966); Baines v. City of Danville, Virginia, 337 F.2d 579, 590-91 (4th Cir. 1964) (en banc), cert. denied, 381 U.S. 939 (1964).

Four provisions have been cited as being in conflict with the reading which the Secretary would give to 7 U.S.C. § 1446(d). These are 7 U.S.C. §§

1421(b), 1441(a), 1446(c), and 1446(b).

The defendants nowhere specifically discuss 7 U.S.C. § 1421(b).[14] Under this section, the Secretary is required to consider, inter alia, "the price levels at which other commodities are being supported." This Court finds as a fact that there is no necessary conflict

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14/ Title 7 U.S.C. § 1421(b) provides in pertinent part:

> The following factors shall be taken into consideration in determining, in the case of any commodity for which price support is discretionary, whether a price-support operation shall be undertaken and the level of such support . . . (2) the price levels at which other commodities are being supported, and, in the case of feed grains, the feed values of such grains in relation to corn, . . .

between the provisions of 7 U.S.C. § 1421(b) and the provisions of 7 U.S.C. § 1446(d). It follows from this that the Secretary was legally required to consider the level at which other commodities were being supported.

The second cited sections, 7 U.S.C. § 1441(a)[15] requires the Secretary

15/ Title 7 U.S.C. § 1441(a). Cost of Production study; establishment of current national weighted average cost of production; annual revision of study; criteria for study:

> The Secretary of Agriculture, in cooperation with the land grant colleges, commodity organizations, general farm organizations, and individual farmers, shall conduct a cost of production study of the wheat, feed grain, cotton and dairy commodities under the various production practices and establish a cur-

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to prepare for Congress a study concerning the cost of production in dairy farms. There is no indication in 7 U.S.C. § 1446(c) or (d) that the Congress in any way lessened the importance it attaches to cost of production. This Court finds that Congress intended that

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rent national weighted average cost of production. This study shall be updated annually and shall include all typical variable costs, a return on fixed costs equal to the existing interest rates charged by the Federal Land Bank, and return for management comparable to the normal management fees charged by other comparable industries. These studies shall be based upon the size unit that requires one man to farm on a full-time basis.

the Secretary consider costs of production in determining whether he would or would not impose the deduction requirement under § 1446(d).

The only one of the cited provisions to which the defendants address themselves is 7 U.S.C. § 1446(b).[16] This

16/ Title 7 U.S.C. § 1446(b). Policy with regard to dairy products:

> The production and use of abundant supplies of high quality milk and dairy products are essential to the health and general welfare of the Nation; a dependable domestic source of supply of these foods in the form of high grade dairy herds and modern, sanitary dairy equipment is important to the national defense; and an economically sound dairy industry affects beneficially the economy of the country as a whole.

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statute declares that it is the policy of Congress, inter alia, "to stabilize the economy of dairy farmers at a level which will provide a fair return for their

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It is the policy of Congress to assure a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy.

labor and investment when compared with the cost of things that farmers buy."

In the Notice of Determination, the Secretary stated: "The general non-binding policy of section 204 [7 U.S.C. § 1446(b)] is, of course, subject to the specific statutory standards of section 201(c) [7 U.S.C. § 1446(c)]" 48 Fed. Reg. at 11,255. This statement in the Notice of Determination parallels the explanation given in the Defendants' Memorandum. Defs'. Memo. at 45-47. This reading is, however, quite untenable, because it assumes that the Congressional enactment of 7 U.S.C. § 1446(b) is a frivolous section.

Having carefully read 7 U.S.C. § 1446(c) and 7 U.S.C. § 1446(b), this Court finds that there is no necessary conflict between these two provisions,

and therefore no need to construe one to the exclusion of the other. There is no repugnance in a price support program which is based on the factors set forth in 17 U.S.C. § 1446(c) which also considers the Congressional policy of providing a fair return to dairy ;farmers for their labor and investment.

Therefore, this Court finds that there is no factual basis for the contention that the Secretary should exclude consideration of the policies set forth in 17 U.S.C. § 1446(c) in implementing the deduction requirement.

This Court has already noted that the Congress re-enacted 7 U.S.C. § 1446(c) as part of § 101 of the Omnibus Budget Reconciliation Act. This Court regards this congressional action as fatal to the reading which the Secretary

would give to § 1446(d) as giving him sweeping discretionary powers. The re-enactment of § 1446(c) with its specific mention of the cost of production makes the Secretary's reading of this statute sound only if this language is ignored. This Court cannot ignore the plain language of the statute. There is nothing in the language of § 1446(d) which even suggests that the Congress intended the Secretary of Agriculture not to adhere faithfully to these four statutory provisions in making his decision concerning the implementation of the deduction requirement. Indeed the simultaneous re-enactment of § 1446(c) is an unequivocal indication that the Congress intended for concerns related to the cost of production to enter into the Secretary's decision-making process. Otherwise, as

noted above, the re-enactment of this provision would have been a grand nullity. Congress does not engage in such nullities.

H. Legislative History.

In construing a statute, it is appropriate for this Court to look to extrinsic aids in order to shed light on the meaning of the Act. United States v. Zacks, 375 U.S. 59, 69 (1963); Portland Cement Association v. Ruckleshaus, 486 F.2d 375, 379-80 n.13 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); United States v. State of Louisiana, 225 F.Supp. 353, 361 (E.D. La. 1963) (3-judge panel per Wisdom, J.), aff'd. 380 U.S. 145 (1965).

The significance which a reviewing court should give legislative history materials is, however, limited by the

fact that it is the statute which the Congress enacted, not the history. While legislative history may clarify ambiguous language, cannot negate the unambiguous direction which the Congress has given in 7 U.S.C. § 1446(c). United States v. Oregon, 366 U.S. 643, 648 (1961), reh'g. denied, 368 U.S. 870 (1961); Doski v. M. Goldseker, 539 F.2d 1326, 1332 (4th Cir. 1976); Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 106 (D.C. Cir. 1976); United States v. Deluxe Cleaners & Laundry, Incorporated, 511 F.2d 926, 929 (4th Cir. 1975); Shackleford v. United States, 383 F.2d 212, 215 (D.C. Cir. 1967); General Cigar Company v. Lancaster Leaf Tobacco Company, 323 F.Supp. 931, 937 (D. Md. 1971); United States v. Gerhardt, 275 F. Supp. 443, 456 (S.D. W. Va. 1967).

I undertake a rather brief examination of the legislative history to demonstrate that as in State Water Control Board v. Train, 559 F.2d 921, 924 (4th Cir. 1977), "that history actually tends to reinforce the 'plain meaning' of the text."

According to the Secretary's own explanation, he approached the Congress in May of 1982, asking for discretionary authority to lower the price support level. Dairy Policy Statement 4,10. The Congress refused to adopt this plan. Indeed, the House of Representatives had adopted a completely different plan. Under the House plan, the authority to vary support price levels would be vested in an entirely new body, which would be composed of 15 representatives of the dairy industry and the Secretary. See

128 Cong. Rec. H-6020-21, 6097 (Aug. 16, 1982). Any contention that consideration of impact of a deduction requirement would have been excluded under this plan is unbelievable.

The legislative history indicates that the fine points of dairy policy were hardly uppermost in the mind of the Congress. As counsel for the defendants argued in the hearing of January 4, the Omnibus Budget Reconciliation Act was an obvious compromise. Hearing of Jan 3-4, 1983 at 341 (McGrath). The entire Omnibus Budget Reconciliation Act was viewed as a necessary prerequisite to the Tax Equity and Responsibility Act of 1982. The measure was a compromise, from which little coherent legislative history emerged (hearing of January 3-4, 1983, Tr. 341 (McGrath)), and in which there

was probably little clear intent. The evidence to which the Secretary points is two pages of the daily session of the Congressional record. In the Senate, debate on the entire measure, covering many provisions other than the deduction authority, was limited to two hours. The report which the conferees made during this discussion amounted to little more than a summary of the provisions of the Act. 128 Cong. Rec. S. 10762-70 (Aug. 18, 1982). The House of Representatives gave the measure little more consideration. The record in the House does not show an intent to enact any substantial change to the existing system of law. 128 Cong. Rec. H. 6020-21, 6093, 6097, (Aug. 16, 1982); id. at H. 6360-63 (Aug. 18, 1982).

This is general floor debate. As

such, the materials cited by the defendants are the least credible of legislative history materials. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n. 24, reh'g. denied, 425 U.S. 986 (1976); United States v. United Mine Workers, 330 U.S. 258, 276-77 (1974); United States v. Wrightwood Dairy Company, 315 U.S. 110, 125 (1942).

I also find conspicuous that opponents of the compromise measure never mentioned a sweeping grant of power to the Secretary. I am aware that remarks made by opponents of legislation as generally entitled to little weight. The Supreme Court has explained that the reason for this is because "In their zeal to defeat a bill, they understandably tend to overstate its reach." National Labor Relations Board v. Fruit and Vege-

table Packers and Warehousemen, Local 760, 377 U.S. 58, 66 (1964). In this instance, the proponents and opponents alike were silent on expansion of the Secretary's discretion. This Court finds the absence of any discussion of expanding the Secretary's discretion indicates that this was never considered by the Congress.

Having examined the Congressional Record and considered the comments of the various members of the House of Representatives and the Senate as to this measure, this Court finds that the Congressional Record shows no evidence which would support an expansive grant of power to the Secretary of Agriculture with respect to the deduction requirements authorized by § 101 of the Omnibus Budget Reconciliation Act. The evidence points

entirely to a grant of the right to initiate rulemaking as to these deduction requirements consistent with and confined to the existing legal framework. Thus, the legislative history of this provision reenforces the plain language of this Act, and both the plain language and the the legislative history stand against the Secretary's interpretation.

I. The Issue of Lead Time.

In describing his approach to the Congress in May, 1982, the Secretary has said: "At that time, I also promised not to adjust the support level until January 1, 1983. I made that pledge in May to allow the producers enough time to begin making the necessary cutbacks and still have the benefit of the higher price support." Dairy Policy Statement at 3 (Mar. 16, 1983).

In the hearing of January 3-4, 1983, the defendants contended that the need to provide lead time was so urgent that it constituted "good cause" sufficient to excuse them from compliance with the notice-and-comment requirements of 5 U.S.C. § 553. See Hearing of January 3-4, 1983, Tr. 152, 161, 172, 182 (Shaw), and 341, 344-45, 348 (McGrath).

In imposing the current deduction requirement, the Secretary allowed only one month lead-time, despite the fact that the spring of the year is one of the financially tightest seasons which dairy farmers face. See Hearing of April 12-14, Tr. 75-76 (Yokeley).

This Court finds that the Secretary has offered no explanation for why he has provided no lead-time for this program when he felt compelled to promise lead-

time when he approached the Congress.

J. The Secretary's Application of § 101.

One aspect of the Secretary's action which deeply undercuts any claim that he is acting to implement the intent of the Congress is the Secretary's inconsistency of application of the statute.

The two deductions authorized by § 101 are both authorized in identical language. See 7 U.S.C. § 1446(d)(2) and § 1446(d)(3)(A) ("the Secretary may provide for"). It is a well accepted canon of statutory construction that where Congress uses identical language in two parts of a statute, the language is to have a consistent meaning, absent strong indications to the contrary. Atlantic Cleaners & Dryers, Inc. v. United States,

286 U.S. 427, 433 (1932); Director, Officer of Workers' Compensation v. Forsyth Energy, 666 F.2d 1104, 1108 (7th Cir. 1981); Alabama Power Company v. Costle, 636 F.2d 323, 396 (D.C. Cir. 1979); Fortin v. Marshall, 608 F.2d 525 (1st Cir. 1979); United States v. Nunez, 573 F.2d 769, 771 (2d Cir.) cert. denied, 436 U.S. 930 (1978); Hotel Equities Corp. v. Commissioner, 546 F.2d 725, 728 (7th Cir. 1976); Myer v. United States, 175 F.2d 45, 47 (2d Cir. 1949); Lewellyn v. Harbison, 31 F.2d 740, 742 (3d Cir. 1929).

This Court has found no evidence in the statutory language or the legislative history suggesting that Congress intended these words to have different meanings.

The Secretary's handling of the two deductions is entirely different. The

first he has imposed with a great tenacity. The second he has not imposed. The official reason given for the Secretary's non-imposition of the second deduction requirement is:

> The Department published, in January, 1983, a proposal for the implementation of a $1.00 per hundredweight deduction and a refund program, but no final regulation establishing a refund program has been published. Therefore, only a 50-cent, not the proposed $1.00 per hundredweight deduction may be imposed at this time.
>
> 48 Fed. Reg. 11,254 (1983).

This response is unbelievable. First of all, it suggests that the failure to publish a rule precludes a decision to implement the second deduction. The suggestion is specious. Publication

follows and memorializes the decision; it is not a precondition to the decision.

Second, the Secretary, in this same Final Notice of Determination, stated that he was not bound to observe the notice and comment requirements of 5 U.S.C. § 533. This would, of course, mean that he regarded himself as at liberty to dispense with the publication of the final regulation. How the Secretary let his failure to perform an act he regarded as voluntary thwart the intent of Congress is unexplained.

The explanations appearing in the Secretary's dairy policy statement, although more credible, are equally inadequate: Bureaucratic inconvenience to the Department and to the dairy farmers. Dairy Policy Statement at 4, 8.

As to the bureaucratic inconvenience

to the Department, this cannot serve as an excuse for refusing to implement the intent of the Congress. Campbell v. United States Department of Agriculture, 515 F.Supp. 1239, 1249 (D.D.C. 1981); Brown v. Harris, 491 F.Supp. 845, 849 (N.D. Cal. 1975).

As to the bureaucratic burden on dairy farmers, it is plainly inconsistent for the Secretary to impose a deduction without considering the economic impact while refusing to impose a second deduction because of paperwork farmers would have to do. This explanation is particularly suspect because it completely overlooks the various indications in the Congressional Record and the Congress intended the refund program under the second deduction to provide a meaningful incentive for farmers to reduce produc-

tion by allowing them to recoup the losses they would otherwise have to absorb under this deduction program. See, e.g., 128 Cong. Rec. H. 6362 (Statement of Rep. Jeffords).

This Court finds that the Secretary has provided no reasonable explanation for insisting on the implementation of the first deduction while refusing to implement the second.

Finally, the statements of the Secretary show that his perception of the mandate of Congress is most curious. Throughout the Secretary's policy statement of March 16, 1983 he threatens that unless the Congress changes the legislation, he will implement the second deduction. In other words, if Congress does not change the law, the Secretary will put the law into effect. This threat

shows that the ostensible mandate under which the Secretary claims to be acting is curious indeed, when the worst thing that the Secretary can do to the Congress is implement the statute.

This Court finds that the Secretary's statement that unless the law is changed he will implement the second deduction, coupled with his inadequate explanation for his current failure to implement that deduction while insisting that the first deduction had to be implemented, show that the Secretary has no cohesive view of the mandate of Congress under § 101.

K. The Department's Understanding Of The Mandate of § 101.

A final point compels this Court to the conclusion that the Congress did not give the Secretary of Agriculture a

sweeping mandate to disregard other statutory or policy considerations in attempting to implement this deduction requirement: the defendants themselves do not believe that there was a mandate. Mr. Dawson Ahalt, cross-examined by counsel for the plaintiffs-intervenors Associated Milk Producers, Inc., gave the following testimony:

> Q. Now, would you also agree with me, Mr. Ahalt, that the underlying principal purpose of the Omnibus Act was to try to accomplish some meaningful reduction in the over-production of dairy products in this country?
>
> A. * * *
>
> I am not sure that that was what they [the Congress] had in

mind to tell the truth.

Q. Well, you are a policy maker aren't you, Mr. Ahalt?

A. Yes.

* * *

Q * * *

Is it not correct that the principal purpose of the Omnibus Act of 1982, which gave the Secretary only three choices, that the principal purpose of that legislation was to reduce production, and to bring supply in line with demand?

A. I am not sure that was Congress' principal objective in passing that legislation.

Q. Yon [sic] don't know? Is that correct?

A. Yes.

Hearing of April 12-14, tr. 457-58 (Ahalt).

This admision substantially undercuts the Department's claim that it is acting to carry out the intent of the Congress. The key policy-maker in the Department, the man charged with responsibility for this program, admits under oath that he does not know what Congress intended. Obviously, this admission raises a very serious question: how can the Department of Agriculture carry out the intent of the Congress when the key policy-makers in the Department do not know what the intent of the Congress is?

The answer to this question is obvious. The Department of Agriculture is not carrying out the intent of the Congress. The Department of Agriculture

is implementing what it considers to be the best policy under the circumstances.

It may well be that the policy which the Department of Agriculture proposes is sound. It may well be that the policy which the Department proposes would be very beneficial to the dairy industry and to the nation as a whole. It is not, however, a policy to which the Congress has given its approval. It therefore has no warrant in law.

L. Conclusion.

To summarize this Court's view, I believe it is easiest to grasp this Court's reaction to the defendants' handling of this statute by recalling their characterization of the factors mentioned in 7 U.S.C. § 1446(c):

> The major goal of the [milk price support] program is to promote the general welfare

> of the nation by assuring that enough milk is produced to meet current needs and anticipate [sic] future needs. 7 U.S.C. § 1446(c).

Defs'. Memo. at 46.

This view ignores the cost of production. Ignoring cost of production has major consequences. It means that the defendants can call legitimate a rulemaking in which impact to the statutory beneficiaries is declared irrelevant. It means that the defendants can claim authority to disregard other statutory criteria. It means that the defendants can dismiss significant comments.

It is also baseless. This Court has carefully considered the statutory language of § 101 of the Omnibus Budget Reconciliation Act of 1982. I have also reviewed the Congressional Record for the

debates in which the Omnibus Budget Reconciliation Act was adopted by the two houses of Congress, August 16-18, 1983.

The Court finds as a fact that there is no credible evidence, in the language of § 101 of the Omnibus Budget Reconciliation Act or in the legislative history thereof, which supports defendants' contention that cost of production is not to be included in the Secretary's determination of whether or not to impose this deduction requirement.

Therefore, this Court concludes that the defendants have misconstrued § 101 of the Omnibus Budget Reconciliation Act. Specifically, this Court concludes that the defendant's reading of the statute violates the clear mandate of 7 U.S.C. § 1446(c).

While misconstruction of a statute

is not per se error in an informal rule-making concept, this case unquestionably involves a misconstruction of a statute which is so central to the purposes of the support price program that any suggestion that this error is harmless is specious. The defendants' misconception of the law is fatal to the validity of their action. As Mr. Justice Frankfurther wrote for the Supreme Court in Securities and Exchange Commission v. Chenery, 318 U.S. 80, 94 (1943), "if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the Agency has misconceived the law." Accord, Allied Chemical & Alkali Workers v. Pittsburg Plate Glass Company, 404 U.S. 157, 171-172 (1971); Citizens to Preserve Overton

Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971); National Labor Relations Board v. Brown, 380 U.S. 278, 290-92 (1965); Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 715-16 (8th Cir. 1979); Maine Public Service Company v. Federal Power Commission, 579 F.2d 659, 669-70 (1st Cir. 1978); Midwest Video Corporation v. Federal Communications Commission, 571 F.2d 1025, 1037 (8th Cir. 1978), aff'd. 440 U.S. 689 (1979); International Brotherhood of Electrical Workers v. National Labor Relations Board, 487 F.2d 1143, 1170-71 (D.C. Cir. 1973); Thompson v. Clifford, 408 F.2d 154 (D.C. Cir. 1969); Kovac v. Immigration and Naturalization Service, 407 F.2d 102, 104 (9th Cir. 1969); Committee for an Independent P-I v. Smith, 549 F.Supp. 985, 989 (W.D. Wash. 1982); Baber v.

Schweiker, 539 F.Supp. 993 (D.D.C. 1982); Timken Company v. Vaughan, 413 F.Supp. 1183, 1190 (N.D. Ohio 1976); Digilab, Incorporated v. Secretary of Labor, 357 F.Supp. 941, 942 (D. Mass. 1973); Golabek v. Regional Manpower Administration, United States Department of Labor, 329 F.Supp. 892 (E.D. Pa. 1971); McKenney v. Irzyk, 317 F.Supp. 1051 (D. Mass. 1970); Williams v. Celebrezze, 243 F.Supp. 103, 107 (E.D. Ark. 1965); General Motors Corporation v. United States, 207 F.Supp. 641, 644 (E.D. Mich. 1962).

VII.

THE RESPONSE TO THE COMMENTS

The single document showing the defendants' response to the over 30,000 comments which have been submitted con-

cerning this assessment is the memorandum of Dr. Charles Shaw, Summary of Public Comments on Proposed Dairy Determinations (Plfs-Intervs' Exh. 8). This comment memorandun is the only source suggested for the cursory response to the comments contained in the Final Determination. Hearing of Apr. 12-14 tr. 313-14, 316-17 (Shaw).

The tabular breakdown of non-specific comments is sufficient for what it is: a mathematization of the simple non-specific comments. I consider Dr. Shaw's description of these non-specific comments generally accurate. These are largely form letters, petitions, or simple notes, voicing little mroe than a "yes" or "no" response to the proposed

deduction.17/ Some 97%, of course, responded "no."

17/ By arithmetic calculation at least 2,807 of the 4,584 respondents gave only a yes-or-no comment. All figures are from the Table 1, Shaw Comment Memorandum, P. I. Exh. 7

Total responses (bottom line)	6,361
Total respondents (top line)	4,584
subtract	-
The result is the number of additional responses	1,777

Assuming that every person making an additional response made only one response, this means that 1,777 responses made more than a yes-or-no response.

The number of single responses is then found by subtracting this number from the original number of respondents.

Total Respondents	4,584
Less Multiple Respondents	1,777
Simple Yes-or-No Respondents	2,807

If the assumption stated above, that all multiple responses contain only one second factor, does not hold, then the number of simple responses would increase.

Notably absent from Dr. Shaw's memorandum are the comments from the original September announcement. See Hearing of Apr. 12-14, Tr. 234 (Shaw). This absence is significant for several reasons. First, the Secretary specifically stated in his Notice of proposed determination of January 27, 1983 that "Comments submitted pursuant to the notices of September 24, 1982, and December 17, 1983 (47 FR 42112,56500), will be considered in connection with this proposed determination." 48 Fed. Reg. 3,764 (1983). Further, in the Notice of Final Determination, he stated that the September comments had been considered. See 48 Fed. Reg. 11,254 (1983). There is neither documentary evidence nor testimony to support this statement. The January assurance that earlier comments

would be considered may have caused a large number persons opposed to the deduction to forego further response in reliance on the Secretary's assurance that he would consider their earlier stated views. In response to the September notice, "The Depertment received comments from more than 25,000 sources. Included were a number of petitions containing nearly 23,000 signatures. . . ." 47 Fed. Reg. at 53,832 (1983); see also 48 Fed. Reg. 11,254 (1983). The Shaw Comment Memorandum tabulates only 4,584 non-specific comments. Further, the December comments came when the initial 50-cent deduction had already been ordered imposed by the Secretary and were made specifically in response to a proposal to impose the second deduction. Comments made in

January came in response to a proposal for both the first and the second deductions. Only the September comments respond to the first deduction alone, which is the actual subject of the Final Determination of March 17, 1983. Thus, the comments discussed in the Notice are not necessarily even a representative response.

To anticipate a suggestion, this Court will consider no post hoc assertions that the September comments were considered in arriving at the Final Determination of March 17, 1983. It appears plainly that in March, 1983, these 25,000 comments did not even receive the two-sentence remark with which they were dismissed in December. (See 47 Fed. Reg. at 53,932 (1983)). There being no evidence that the comments

from September were considered, this Court finds as a fact that the September comments were not considered.

Assuming arguendo that the treatment given to the non-specific comments could be considered adequate, the treatment given the twenty-two comments classified as detailed is patently inadequate. These detailed comments raised significant questions as to the validity of the Secretary's factual assumption, the adequacy of his analysis, and the accuracy of his methods. This is clear from a summary of these comments:

¶The Plaintiffs-Intervenors lead by the Suncoast Milk Producers Cooperative submitted a comment covering 25 pages of discussion with a multi-page tabular appendix. The Plaintiffs-Intervenors challenge the use of gross revenue fig-

ures, contending that these tend to produce a badly disproportionate picture of impacts, and criticize the total failure to consider other farm programs.

¶The Cache Valley Dairy Association contends that the analysis is flawed for want of consideration of a return to labor and investment, as required by 7 U.S.C. § 1446b, or of a return to management pursuant to 7 U.S.C. § 1441a. The comments call the Secretary's analysis so broad-brush as to be meaningless. The Association notes that in its haste to enact this program, the Congress conducted no studies of overall impact, held no hearings, and made no findings. The Association contends that the duty to undertake these studies now falls to the Secretary. The Association charges that many dairy farmers will be forced out of

business and contends that effective public participation in the decision-making process has been foreclosed because of the Secretary's failure to make a meaningful factual presentation to the public.

¶The Dairy Farmer Distributors of America, et al., contended that the evidentiary foundations for the Secretary's rulemaking have never been disclosed. They charge that production costs have moved up considerably over time, a fact reflected neither in a compensating increase in price supports nor in any part of the analysis. They contend that the assessment may well wipe out much of the dairy industry. The Dairy Farmer Distributors of America also specifically contend that the assessment violates 7 U.S.C. §§ 1441a, 1446(c), which is part

of § 101, and 1446b.

¶The Northeast Dairy Cooperative Federation, Inc. contended that the proposal would actually increase rather than decrease production. It contended that the entire measure was an ill-considered late-night legislative compromise.

¶The national Milk Producers Federation contends that there has been no analysis of the potential impact of this assessment on rural farm income, an impact which could be billions of dollars, a multiple of the amount of revenue the assessment will generate.

¶The national Farmers Organization contends that the program will force many farmers out of business and put may others into a marginal status in which their economic existence will be continually in jeopardy. The impact will be

greatest on young farmers and family operations. The program will further create a ripple effect which will disrupt the entire rural economy. The result of the program will be to increase rather than decrease production.

¶The California Production/Handlers contend that the Department has made statements replete with unsupportable factual assertions. Tight profit margins, for example, result from tight competition rather than "financial instability." There is, they contend, no basis for meaningful dialogue.

¶The New England and New York Independent Milk Producers coalition contends that the Secretary has abused his authority by assuming that the deduction is mandatory. They contend that the deduction will virtually wipe out milk production in the

northeastern United States. They charge that the analysis, filled as it is with gross production figures and national averages, obfuscates rather than illustrates the impact of the deduction.

¶Associated Milk Producers, Incorporated, contends that the assessment program provides no meaningful incentive to decrease production. They contend that the analysis is too general and not sufficiently thorough. There is no meaningful analysis of the impact which this deduction will have on farm income. There is no meaningful analysis of the cost of milk production. (In connection with their comments, Associated Milk Producers submitted a substantial data base to the Department, which would have allowed the Department to conduct meaningful analysis of the impacts of this

program. The Department has never responded to this submission.)

This is a brief summary of nine of the comments, which cover in all over 125 pages. It is only a summary. To these nine comments and thirteen additional non-specific comments, the defendants' total response was:

> Of these 22 respondents, most opposed the deduction and felt that this program will not lead to a balance in supply and demand. Most of these respondents took issue with the Regulatory Impact Analysis asserting that it should in-

> clude a detailed analysis of impacts on individual dairy farmers, States, or regions. Our view is that this is neither possible nor necessary since the dairy price support program is a National program.
>
> Shaw Comment Memorandum at 1.

Dr. Charles Shaw has, since this memorandum, conclusively proven that regional analyses are possible. He has by sworn affidavits provided regional analyses to two different district courts. See Affidavit of Dr. Charles N.

Shaw, submitted in National Farmers' Organization v. Block, C.A. No. 82-C-1602 (E.D. Wis.), analyzing the "Upper Midwest" region; Affidavit of Dr. Charles N. Shaw, submitted in Pennsylvania Farmers Union, Inc. v. Block, C.A. No. 83-0476 (M.D. Pa.), analyzing "Northeast" region. Further, the "record" which the Department has presented to this Court is replete with regional and state analyses which have come to this Court's attention on only a cursory thumbing-through the 41 pound mass of paper which the Department has labelled the record. See e.g., Dairy Market News (a weekly publication replete with ongoing state and regional analysis); see also Dairy Outlook and Situation 21 (Sept. 1982); Dairy Outlook and Situation 7, 8, 10, 13 (June, 1982);

Agricultural Prices 27,55 (Jan. 1983).

This Court finds that it is possible for the Department to produce regional and state impact analyses.

Beyond its inaccuracy, this response is completely inadequate in terms of considering the underlying purposes of th dairy price support program. One of the purposes of that program is national security. See 7 U.S.C. § 1442. In this regard, this Court cannot overlook the words of the Supreme Court in Nebbia v. New York, 291 U.S. 502 (1943)

> Milk is an essential for diet. It cannot long be stored. It is an excellent medion for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption.
>
> Id. at 516

It can hardly be questioned that Congress intended that the supply of milk not be disrupted in the event of a national emergency. The population of this nation is clearly regional, and in the event of a national emergency, large scale transportation of milk supplies will not be feasible. This Court therefore believes that sound administration of the milk price support program requires consideration of potential regional impacts of the Secretary's deduction requirement as those may impact national security concerns.

It may be that the impact of this deduction requirement will not cause regional disruptions which would undercut the dairy price support program as integral to national security. On the current record, however, this is

something which the Secretary apparently would have this Court accept on faith, despite the warnings contained in many of the comments and much other evidence presented to this Court. Where the national security is at stake, this Court is not inclined to such an act of faith. This Court finds that the assertion that there is no need to consider the potential regional impacts of this deduction requirement is highly questionable.

The record shows that these detailed comments never received serious consideration in the decisionmaking process. Mr. Dawson Ahalt, who has been proffered to this Court as the official responsible for the dairy deduction program testified that he never read any of the comments, nor did any other member of the inner

circle of decisionmakers within the Department of Agriculture (Hearing of April 12-14, Tr. 393, 434-45 (Ahalt)). The Secretary, whom Mr. Ahalt describes as continually agonizing over the surplus problem (Id. Tr. 393 (Ahalt)), and the other decisionmakers read, at most, Dr. Shaw's three sentence statement, which, by its own terms, refers to "most" of the detailed comments. (Id. Tr. 435 (Ahalt)).

In the entire record, the only response to the comments other than the Shaw comment memorandum is the Notice of Determination of March 17, 1983. See 48 Fed. Reg. 11,254 (1983). This Court has carefully read the Secretary's response to the comments contained in the Notice of Determination. The two column discussion is by and large a superficial,

non-substantive summary of the contentions raised in the non-specific comments. There is no mention of or response to the many analytical deficiencies brought to the Department's attention by the detailed comments not recorded in the table appended to the comment memorandum. The only language which could be possible interpreted as responsive to even the non-specific comment is:

> The modifications suggested by these respondents have not been adopted. The milk price support program is a national program which benefits milk producers of all categories in all regions of the country. Milk and milk products flow freely in interstate commerce without regard to either geographical or political boundaries. There is no basis for concluding that any

group of producers do not benefit from the program and therefore should be exempt from a deduction which is intended to help offset the cost of the program. Some individual producers will be more seriously affected by the deduction than others. The price support program, however, does not guarantee a profit to every diary farmer.

Although virtually all comments received by the Department opposed any deduction, no practical alternative is available at this time for addressing the problem of excessive milk production and milk price support program costs. Failure to implement any deduction would result in a continuation of the present situation in which milk production and price support program costs are unacceptably high.

48 Fed. Reg. 11,254.

There is no indication that this statement responds to or reflects consideration of anything beyond the Shaw comment memorandum. It could have been easily drafted by someone who had never examined any of the detailed comments.

The defendants contend that this response is adequate in that it shows that the Secretary gave an opportunity for comment, and "considered" the comments. Defs'. Memo. at 59. With regard to the comments to the September Notice of Determination, of course, there is no evidence that these comments were considered at all. Further, as the defendants have reduced 125 pages of cogent, well-reasoned questions and criticisms to a superficial three-sentence dismissal in the Shaw comment memorandum and all comments to the eight line dismissal in

the Notice of Final Determination. This degrades the comment procedure from a process integral to reasoned decision-making to empty charade.

The notice-and-comment procedure is not an extraneous burden on the decision making process; it is a fundamental part of that process. It is intended to allow "an exchange of views, information and criticism between the interested persons and the agency," and by allowing such an exchange to facilitate a dialogue beneficial to the agency, to the interested parties, and to the reviewing court. Home Box Office, Inc. v. Federal Communications Commission, 567 F.2d 9, 35 (D.C. Cir. 1977); accord Portland Cement Association v. Ruckleshaus, 486, F.2d 375, 393-94 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); International

Harvester Co. v. Ruckelshaus [sic], 478 F.2d 615, 649 (D.C. Cir. 1973); Wright, The Court and the Rulemaking Process: The Limits of Judicial Review, 59 Corn. L. Rev. 375, 380-81 (1974); K. Davis, Administrative Law Text 142-43 (3d ed. 1972).

Because the process is one of dialogue, the agency must disclose at the outset the basis for its proposed rulemaking. Here, this was not done. No later than February 15, with the hand-delivery of the letter from the plaintiffs-intervenors to the Department of Agriculture, calling for the studies on which numerous critical assumptions in the Department's proposed rulemaking were based, the Department was aware that the information made available to the public in the January 21 Notice of Proposed

Determination was inadequate to allow full comment. Even assuming an otherwise acceptable handling of the comments, this failure to disclose the basis of the defendants' action fatally flaws the comment process.

This Court has carefully reviewed the January 21 Notice of Proposed Determination, and the comments which have brought the defendants' decision-making procedures into question. This Court finds as a fact that the information made available to the public is critically deficient in that it does not reveal the information animating the defendants' proposal to a sufficient degree to allow effective public comment.

> To suppress meaningful comment by failure to disclose the basic date relied upon is akin to

> rejecting comment altogether. For unless there is common ground, the comments are unlikely to be of a quality that might impress a careful agency. The inadequacy of comment in turn leads in the direction of arbitrary decision-making. We do not speak of findings of fact, for such are not technically required in the informal rulemaking procedures. We speak rather of what the agency should make known so as to elicit comments that probe the fundamentals.

United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977); accord Home Box Office, Inc., supra; Portland Cement Association v. Ruckelshaus [sic], supra; International Harvester Co., supra; see also Weyerhaeuser Company v. Costle, 590 F.2d 1011, 1030-31, (D.C. Cir., 1978).

Further, to be a dialogue, the comment process must include meaningful consideration by and response from the agency. The legislative history of the Administrative Procedure Act speaks clearly to this matter, stating:

> The agency must analyze and consider all relevant matters presented. The required statement of the basis and purpose of rules issued should not only relate to the date so presented but with reasonable fullness explain the actual basis and objectives of the rule.
>
> Statement of the 'Basis and Purpose' of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the object or objects to be sought.

> Sen. Doc. No. 248, 79th Cong. 2d Sess. 201, 259 (1946).

As the Court of Appeals for the District of Columbia has stated, "opportunity to comment is meaningless unless the agency responds to significant points." Home Box Office Inc., 567 F.2d at 35; accord Alabama Power Co. v. Costle, 636 F.2d 323, 384-85; Independent Banker [sic] Association of America v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979); Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975); Consumers Union of the United States, Inc. v. Consumer Products Safety Comm'n, 491 F.2d 810, 812 (2d Cir. 1974); Scenic Hudson Preservation Conference v. Federal Power Commission, 453 F.2d 436, 467-68 (2d Cir. 1971); cert. denied, 407 U.S. 926 (1972); Community Nutrition Institute v. Bergland, 493 F. Supp. 488, 492-93

(D.D.C. 1980); see also Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. at 420.

This does not require that the Secretary respond to every comment, frivolous or otherwise. Home Box Office, Inc., supra; Automotive Parts & Accessories Assn. v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968); Community Nutrition Institute v. Bergland, supra. The test is well articulated in Home Box Office, Inc., supra, where Judge Leventhal said:

> In determining what points are significant, the "arbitrary and capricious" standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency's decision and which, if adopted would require a change in an agency's

> proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. These [sic] must be some basis for thinking a position taken in opposition to the agency is true. See Portland Cement Ass'n v. Ruckleshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973). 567 F.2d at 35n. 58.

The court in Home Box Office explained that the requirement that an administrative agency respond to significant comments is also grounded in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), which indicates that a reviewing court is to insure that all relevant factors were considered.

Accord, Alabama Power Co. v. Costle, supra, 636 F.2d at 384-85.

Responses to substantive issues must show the Court that the administrative agency has "genuinely considered" the questions raised by the comments, and cursory mention of the fact that questions were raised does not show genuine consideration. Portland Cement Association, supra; Hiatt Grain & Feed, Inc. v. Bergland, 446 F.Supp. 457, 583-84 (D. Kan. 1978). A summary of the issues is not a reasoned response and is no substitute for genuine consideration. Portland Cement Association, supra; Pillai v. Civil Aeronautics Board, 485 F.2d 1018, 1027 (D.C. Cir. 1973); Hanly v. Mitchell, 460 F.2d 460 (2d Cir), cert. denied. sub nom. Hanly v. Kleindienst, 409 U.S. 990 (1972).

The standard which must be met is that the agency's response must allow a reviewing court reasonably to discern the agency's reasoning. It must "enlighten the Court as to the basis on which" the agency has made its decision. Kennecott Cooper Corp. v. Environmental Protection Agency, 462 F.2d 846, 850 (D.C. Cir. 1972); accord, Weyerhaeuser Company v. Costle, supra; Appalachian Power Company v. Environmental Protection Agency, 477 F.2d 495, 507 (4th Cir. 1973); General Telephone Company of the Southwest v. United States, 449 F.2d 846, 862 (5th Cir. 1971); Automotive Parts & Accessories Association v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

By contrast, what an agency is not free to do is to leave significant questions unanswered. Alabama Power Company

v. Costle, supra, 636 F.2d at 385. Failure to answer significant questions suggests that relevant factors have not been considered. Nor is it adequate to provide a response which forces the Court to guess at the basis of the agency's judgment. Portland Cement Association, supra; Hanly v. Mitchell, supra, 460 F.2d at 647-48; Corp v. Federal Communications Commission, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); adio [sic] Station KFH Company v. Federal Communications Commission, 247 F.2d 570 (D.C. Cir. 1957). To leave major questions unanswered is to reduce the genuine interchange mandated by statute to a mere bureaucratic sport. Connecticut Light and Power Company v. Nuclear Regulatory Commission, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

Unfortunately, in this instance this is what was done. Despite numerous articulate and substantial comments many of which specifically sought additional information, the defendants have never revealed the bases for many of their conclusions. The detailed comments, if they have been considered at all, have been considered in a perfunctory and conclusory manner indicating that the Department of Agriculture felt that it had nothing to learn from them. The Final Notice of Determination does not even summarize the comments. It presents a cursory and superficially reasoned dismissal which fails to acknowledge the many issues which the comments raised. It does not approach a reasoned or discernable response. With respect to the detailed comments, which offer telling

challenges to the methodology the Department used, this Court finds as a fact that the defendants' response is manifestly inadequate.

The defendants have cited cases in which courts have upheld agency action against challenges to the responses to comments. This Court has examined those cases, but finds that they stand in contrast to the defendants' course of conduct rather than lending it approval. In General Telephone Company of the Southwest, supra, 449 F.2d at 862, the court said of the agency's response to the comments: "Its rationale is clearly stated in its final order such that this court can easily see and understand the major issues of policy which were aired in the proceeding and why the Commission reacted as it did." In this instance,

the Court finds no mention of many of the critical issues going to the defendants' methodology in preparing their data, the adequacy of their analyses, and several other key concerns. There are no responses given. There is no showing that the defendants ever addressed these issues. In Community Nutrition Institute v. Bergland, supra, 493 F. Supp. at 493, the court stated, "Many of the comments voiced by the industry are answered directly in the preamble statements. Others received an indirect response through reference to studies reasonably relied on by the agency." In this case, there has been no reference to studies relied on by the Department, although these have been repeatedly called for. In Independent Bankers Association of America, supra, the court found that the

Comptroller responded adequately to the comments, saying: "This he did, facing directly both the principal legal and management objections in a full [sic] reasoned discussion." 613 F.2d at 1171. That discussion covered eight pages in the Federal Register. In the instant case, the defendants have perfunctorily dismissed criticisms which this Court considers far more fundamental, giving an eight sentence statement which only superficially recognizes the existence of any problems.

This Court is thus put in a position not unlike that which the court faced in Pillai v. Civil Aeronautics Board [sic] 485 F.2d 1018 (D.C. Cir. 1973):

> [T]he Board's discussion is a recital of conclusions, not facts, and of conclusions with little supporting rationale

> visible. As a reviewing court we are thus placed in the position of either accepting, on the basis of sheer faith in the Board's "expertise," the unsupported conclusions, or of vacating the order and remanding for creation of a record. . . . Whether C.A.B. be viewed as having made a choice, but without any reasons having been given for that choice, or viewed as having in actuality made no choice at all, . . . it appears to us the net result is the same; the order must be vacated as either an unsupportable exercise of discretion or an arbitrary failure to exercise discretion at all.

485 F.2d at 1027, 1030.

Accord, Portland Cement Association, supra, 486 F.2d at 393-95 (merely to incorporate into the administrative

record comments challenging the methodology used in a decision-making process without showing any response to the criticisms raised is inadequate).

The burden is on the agency to explain its decision. Before a reviewing court can lend its approval, the Court must be able to discern the course of the agency's reasoning. This in turn requires that the agency's final rule

> must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. . . . [The record must] enable us to see what major issues

> were ventilated by the informal proceedings and why the agency reacted to them as it did.

Automotive Parts & Accessories Ass'n v. Boyd, supra, 407 F.2d at 338; accord, Connecticut Light & Power Co. v. Nuclear Regulatory Commission, supra, 673 F.2d at 528-31; Home Box Office, Incorporated, supra, 567 F.2d at 36; National Nutritional Foods Association v. Wienberger, [sic] 512 F.2d 688, 701 (2d Cir.) cert. denied, 423 U.S. 827 (1975); Pillai v. Civil Aeronautics Board, supra, 485 F.2d at 1023-31.

The record now before this Court is manifestly deficient with respoect [sic] to the responses to the substantive comments. It completely frustrates judicial review. Major questions are left unacknowledged and unanswered. The record

suggests that these questions were simply ignored. The determination of the Secretary to impose this deduction must therefore be vacated. Connecticut Light & Power Co., supra; Alabama Power Company v. Costle, supra, 636 F.2d at 384-85; Home Box Office, Inc., supra; Pillai v. Civil Aeronautics Board, supra; Hanly v. Mitchell, supra; Greater Boston Television Corporation v. Federal Communications Commission, supra; cf Camps v. Pitts, 411 U.S. 138, 142-43 (1973) (per curiam).

VIII

CONSIDERATION OF RELEVANT FACTORS

It is a well-settled principle of administrative law that in order to render a valid decision, an administrative agency must consider the relevant

factors. Bowman Transportation, Incorporated v. Arkansas-Best Freight System, Incorporated, 419 U.S. 281, 285 (1974); Citizen to Preserve Overton Park, Incorporated v. Volpe, 401 U.S. 402, 416 (1971); Curtis, Incorporated v. Interstate Commerce Commission, 662 F.2d 680, 685 (10th Cir. 1981); Northwest Arilines [sic], Incorporated v. Goldschmidt, 645 F.2d 1309, 1318 (8th Cir. 1981); Central Power & Light Company v. United States, 634 F.2d 137, 149 (5th Cir. 1980); American Optometric Association v. Federal Trade Commission, 626 F.2d 896, 905-06 (D.C. Cir. 1980); Humana of Virginia, Incorporated v. Blue Cross of Virginia [sic] 622 F.2d 76, 79 (4th Cir. 1980); National Small Shipments Traffic Conference, Incorporated v. Civil Aeronautics Board, 618 F.2d 819, 826-27 (D.C. Cir.

1980), [sic] Asarco, Incorporated v. United States Environmental Protection Agency, 616 F.2d 1153, 1161 (9th Cir. 1980); Mobile [sic] Oil Corporation v. Department of Energy, 610 F.2d 796, 801 (Temp. Em. Ct. App. 1979); Montana Power Company v. Environmental Protection Agency, 608 F.2d 334, 345 (9th Cir. 1979); Cleveland Electric Illuminating Company v. Environmental Protection Agency, 603 F.2d 1, 5-6 (6th Cir. 1979); Home Box Office, Incorporated v. Federal Communications Commission, 567 F.2d 9, 35 (D.C. Cir. 1977); Citizens for Clean Air, Incorporated v. Administrator, United States Environmental Protection Agency, 480 F.2d 972 (3d Cir. 1973); Chrysler Corporation v. Department of Transportation, 472 F.2d 659, 670 (6th Cir. 1972).

Based on an examination of the entire statutory scheme and the record in this case, this Court finds that there are two classes of factors which are relevant to this discussion: factors made relevant by particular statutes, and impact. Considering first the statutorily mandate [sic] factors, this court finds that United States Code requires that defendants consider returns to producers, under 7 U.S.C. § 1446b, the price at which other commodities are being supported, under 7 U.S.C. § 1421(b), and cost of production, under 7 U.S.C. §§ 1441a and 1446(c).

That impact to be considered is also clear from the general statutory scheme. Dairy farmers are the primary beneficiaries of the dairy price support program. This fact is not altered because the

nation as a whole benefits from the program. Further, such matters as cost of production, returns to labor and investment, and the support levels of other programs are indicia of impact. The Congress has established and continued the dairy price support program for over four decades. The notion that the impact of a major policy change on the primary beneficiaries is not to be considered is completely unsupported by any suggestion or inference of the statutory system or the legislative history of § 101 of the Omnibus Buget Reconciliation Act. See Barlow v. Collins, 397 U.S. 159 (1970).

A review of the defendants' Memorandum to this Court shows quite plainly that the consideration of factors which the defendants undertook rests on a sup-

posed congressional intent to disregard the statutorily mandated factors and impact.[18]/

18/ The following excerpts set forth the defendants' position and show their reliance on congressional intent:

> [I]n determining to impose this deduction, the Secretary considered all those factors that Congress considered relevant, the increasing overproduction of dairy products, the resultant burgeoning cost of the Government's daily price support program and congressional policy relating to farm income and productive capacity sufficient to meet future needs. . . . [T]he Secretary has considered all relevant factors.
>
> Defendants' Memorandum at 45.
>
> The major goal of the [dairy price support] program is to promote the general welfare of the nation by assuring that enough milk is produced to meet current needs and anticipate future needs. 7 U.S.C. § 1446(c).
>
> Id. at 46.
>
> In deciding to impose the 50-cent deduction, the Secretary acted

FOOTNOTE CONT'D ON NEXT PAGE

As this Court found in construing § 101 of the Omnibus Budget Reconciliation Act,

FOOTNOTE CONT'D FROM PREVIOUS PAGE

> consistently with these congressional goals and policy concerns. Congress decided that the dairy program was costing too much and that overproduction should be decreased. Congress then authorized a method for producers to help defray the costs of the dairy price support program. Congress indicated at what point its expressed concern should receive very serious consideration by authorizing the Secretary to impose the deduction when he estimate that the CCC's net price support purchases will exceed 5 million pounds milk equivalent in any fiscal year. . . . Thus, it was Congress that decided there would be a financial impact upon dairy farmers.
>
> Id. at 56-57.
>
> To the extent that Intervenors' arguments are based on the financial impact resulting from the deduction, they are entirely without merit. Congress did not tell the Secretary that he should refrain from imposing the deduction because of such consequences. Rather, within certain other well-defined limits Congress left discretion to the Secretary.

FOOTNOTE CONT'D ON NEXT PAGE

there is no evidence of congressional intent to disregard any of the statutory factors enunciated in 7 U.S.C. §§ 1421(b), 1441a, 1446(c), or 1445b. Indeed, the reenactment of 7 U.S.C. § 1446(c), as part of § 101 of the Omnibus Act renders any such argument

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FOOTNOTE CONT'D FROM PREVIOUS PAGE

Id. at 58.

The issues raised by Intervenors, in one form or another all dealt with the harmful financial impact to the dairy farmer. As discussed above, in light of congressional policy choices it was not unreasonable for the Secretary to view this issue as less important than decreasing production and the cost of the CCC's purchase of dairy products.

Id. at 60.

In light of Congress' express policy concerns, the Secretary's examination of gross revenues as opposed to net production costs is not arbitrary or capricious.

Id. at 62.

totally untenable.

Examining the record in this case, this Court must decide, independent of the defendants' assurances, whether the relevant factors have been considered. As a preliminary, the Court must decide what is consideration? The cases show that consideration of the relevant factors requires more than a curt mention in the administrative record or a post facto assertion by a witness for the agency that the factor has been considered. What is required is "a 'hard look' at the salient problems," Greater Boston Television Corporation v. Federal Communications Commission, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), or, in other words, "fair, good faith consideration." Sierra Club v. Froehlke, 486 F.2d 946, 952-53 (7th Cir.

1973); accord, West Virginia Public Services Commission v. United States Department of Energy, 681 F.2d 847, 859 (4th Cir. 1982); Miner v. Federal Communications Commission, 663 F.2d 152, 155 (D.C. Cir. 1980); Conservation Council of North Carolina v. Froehlke, 473 F.2d 664 (4th Cir. 1973); Environmental Defense Fund v. Corps of Engineers, United States Army, 412 U.S. 931 (1973); Alabama Power Company v. Federal Power Commission, 450 F.2d 716, 721 (D.C. Cir. 1971); WAIT Radio v. Federal Communications Commission, 418 F.2d 1153, 1156 (D.C. Cir. 1969); City of Chicago v. Federal Power Commission, 385 F.2d 629 (D.C. Cir. 1967), cert. denied, 390 U.S. 945 (1968).

This does not mean that the defendants are required to give the same

weight to these factors as the plaintiffs and intervenors do. See Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir), cert. denied sub nom. Hanly v. Kleindienst, 409 U.S. 990 (1972). But this standard unquestionably does not permit the defendants to dismiss relevant factors without serious consideration.

In this case, the defendants have submitted an administrative record. It consists overwhelmingly of documents published by the United States Department of Agriculture. Many have little if any bearing on the deduction which is the subject of this action. Further, there is no indication in the record that any decision-making within the Department of Agriculture considered all or any part of these published studies in deciding whether to impose this deduction.

On the other hand, the defendants have withheld from this Court memoranda to which there has been considerable testimony. See e.g., hearing of April 13, 1983, Tr. 445-46 (Ahalt). These have not been provided to this Court. This Court looks askance on the defendants' refusal to provide this Court with a complete administrative record while burdening the Court with a box weighing 41 pounds, filled with a 17 and 3/4 inch thick pile of papers which has virtually no use in these proceedings. The defendants "may not unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court's inquiry." Tenneco Oil Company v. Department of Energym [sic], 475 F.Supp. 299 (D. Del. 1979).

The defendants have supplemented the administrative record with the testimony of Mr. Dawson Ahalt and Dr. Charles Shaw. This Court is deeply troubled by the defendants' reliance on post facto rationalization to make up for the deficiencies in the administrative record. Even assuming that the testimony of these witnesses was of unquestionable veracity, it comes too late. The purpose of an administrative record is not merely to impress this Court. It is to demonstrate to the public and all interested parties a reasoned, discipline decision-making process. The benefit of this process is sorely undercut, and with it the faith that the public has in the process and the decision-maker, where critical links in the chain of reasoning are revealed

only after-the-fact and only to those who focus their attention on this Court.

Further, this Court cannot overlook the highly suspect nature of post facto rationalizations offered through the testimony of officials who are obviously interested in securing this Court's approval of their actions. While I recognize that there is authority which allows the explanation of an administrative record, see, e.g., Hiatt Grain & Feed Company v. Bergland, 446 F.Supp. 457, 480 (D. Kan. 1978), I note that the cases are clear: what is permitted is explanation, not augmentation. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973). I

find that the testimony of the defendants' witnesses goes beyond any limits of explanation and constitutes a sweeping expansion of the administrative record. As such, it must be viewed with grave suspicion, and I note that in many courts, it would not be considered at all.

> [T]he agency may not support its decision by reference to facts outside the administrative record or a course of reasoning disclosed for the first time in judicial proceedings.

Williams v. Robinson, 432 F.2d 637, 642 (D.C. Cir. 1970)

> When action is taken on a record the department cannot then present testimony in court to remedy the gaps in the record, any more than arguments of

> counsel on review can substitute for an agency's failure to make findings or to give reasons.

Zuber v. Allen, 396 U.S. 168, 196 (1969); accrod [sic], Federal Power Commission v. Texaco, 417 U.S. 380, 397 (1974); National Labor Relations Board v. Metropolitan Life Insurance Company, 380 U.S. 438 (1965); Burlington Truck Lines v. United States, 371 U.S. 156 (1962); Securities & Exchange Commission v. Chenery Corporation, 318 U.S. 80, 93-94 (1943); Louisiana-Pacific Corporation v. Block, 694 F.2d 1205 (9th Cir. 1982); Columbus & Southern Ohio Electric Company v. Costle, 638 F.2d 910, 912 (6th Cir. 1980); U.S. Lines, Incorporated v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978) American Iron & Steel Institute v. Envi-

ronmental Protection Agency, 568 F.2d 284, 296-97 (ed [sic] Cir. 1977); Tabor v. Joint Board for Enrollment of Actuaries, 566 F.2d 705 (D.C. Cir. 1977); Tanners' Council of America, Incorporated v. Train, 540 F.2d 1188, 1193 n. 13 (4th Cir. 1975).

This Court is particularly disinclined to accept post hoc rationalizations from agency witnesses when these witness are repeatedly less than completely frank in their responses to questions. See, hearing of April 12-14, Tr. 260-61, 266, 279, 291-92, 305-06, 319-20, 342, 372-73 (Shaw); 443-48, 454-56 (Ahalt).

Turning then to the administrative record which the Department of Agriculture has presented to this Court, I find that there has been no serious consider-

ation of fair return to labor and investment as required by 7 U.S.C. § 1446b. This fact is made quite apparent from the defendants' refusal to undertake any analysis of the impact of the 50-cent per hundredweight deduction other than on gross returns bases. The witnesses for the defendants insist that the use of gross returns is quite adequate to allow analysis of costs of production and return to producers. This Court does not agree. The necessity of using "net" figures is made quite clear from the defendants' attempt to explain how the deduction requirement will succeed. That explanation cannot be undertaken without using net costs. In the Notice of Determination of March 17, 1983, in the Summary of Final Regulatory Impact Analysis, at 48 Fed. Reg. at 11,255, the Secretary

used the term "net" five times in four column-inches. Removing the word "net" would render that discussion unintelligible.

Further, the concept of net costs is so fundamental to any economic or accounting analysis that the exclusion of this concept without explanation is unthinkable. Net returns are normally included in analyses prepared by the Department of Agriculture. See Hearing of Apr. 12-14, tr. 405 (Ahalt). There was no sound reason for excluding them from the analysis. Id. 279-80, 283 (Shaw) Yet they were excluded entirely from these analyses.

That the concept of net is fundamental to economic analysis cannot be seriously doubted. One cannot even balance a checkbook without using net figures. The

deduction requirement is an unprecedented program, which will take sixty million dollars per month from dairy farmers. The defendants suggest that analyses done with an arithmetic methodology so crude that it could not balance a simple checkbook are adequate. This Court disagrees: assessments based solely on gross returns are not adequate.

This Court finds that the defendants have not considered returns to dairy farmers for their labor and investment when compared with the cost of things that farmers buy. Because this consideration is mandated by 7 U.S.C. § 1446b, the decision to impose this deduction cannot stand.

As to the price levels at which other commodities are being supported, this Court has carefully reviewed the

impact statements prepared by the Department of Agriculture with respect to both the decision to impose the 50-cent per hundredweight deduction on milk and the Payment-in-Kind program. After careful consideration, I find that the analyses which the Department has rendered with respect to effect of the Payment-in-Kind program are "astonishingly inadequate. There is no analysis at all there." (Hearing of April 12-14, Tr. 138 (Motes)).

As to the cost of production, Mr. Dawson Ahalt testified that in analyzing the proposal to impose the 50-cent per hundredweight deduction, he did not rely on cost of production data. He places little stock in the cost of production analyses because of the difficulties of apportioning fixed costs and overhead

into these studies. Though acknowledging that the law requires the Department of Agriculture to produce cost-of-production analyses, Mr. Ahalt puts little faith in these studies. He contends that they are, at best, averages. (Hearing of April 12-14, Tr. 403-04 (Ahalt).) Further, Mr. Ahalt has found that the use of cost of production figures in analyses leads to giving these figures too much credence, so that the goals which the Department of Agriculture regards as important are disregarded. (Id. at 405 (Ahalt).)

The Congress has specifically directed the Secretary to consider cost of production in dairy price support decisions. Even assuming that studies done without cost of production are somehow "better," the defendants are not at lib-

erty to alter or disregard the mandate of Congress because they believe they have a better way. That decision is for the Congress to make. The Congress has made that decision, and has directed the defendants to carry that decision out. Minimally, if the defendants believe that they have a policy better than that adopted by the Congress, they should take their policy before the Congress for consideration and possible approval. To implement their own vision of policy while pretending to carry out that which Congress has adopted is not merely irresponsible, it is illegal. This Court finds cost of production has not been considered. Because consideration of cost of production is mandated by 7 U.S.C. § 1446(c), the decision to impose the deduction cannot stand.

Turning finally to the defendants' consideration of impact, this Court finds that the impact of the 50-cent per hundredweight deduction has not been adequately considered.

¶ The frequently advised course of culling cows has not been analyzed. Hearing of Apr. 12-14, tr. 265 (Shaw).

¶ No document which has been shown to this Court contains any analysis of net returns to producers. Id. at 275, 281-82 (Shaw).

¶ The "multiplier effect," although a standard element of economic analysis, was not included in any study undertaken concerning this deduction. Id. at 299-300 (Shaw).

¶ There have been no studies done on the impact of this deduction on the general economy. Id. at 301 (Shaw);

665-[sic] (Ahalt).

¶ There has been absolutely no study undertaken concerning the number of persons who will be driven out of business because of the imposition of this deduction. Id. at 286-88 (Shaw); 438 (Ahalt).

¶ No official within the Department of Agriculture has ever even asked for any analysis of impact. Id. at 364 (Shaw).

¶ Although the Secretary has suggested refinancing as a way cover the cost of this deduction, there has been no examination of any document concerning the financial situation of dairy farmers. Id. at 288-89 (Shaw).

¶ No document has been brought to this Court's attention showing seasonal costs or any consideration thereof.

¶ No document has been brought to this

Court's attention showing that the alteration of feed rations is a viable cost-cutting method.

¶ No document has been brought to this Court's attention showing what changes farmers will make in their production in response to this program.

¶ No document has been brought to this Court's attention showing any analysis of whether this deduction will decrease or will actually increase production.

¶ No document has been brought to this Court's attention showing consideration of the possible effects of this deduction program on "responsible persons."

¶ No document has been brought to this Court's attention concerning the potential costs of dairy farmers going out of business.

The defendants assert that the con-

sideration of impact in the various impact statements and in the Notice of Determination of March 17, 1983, 48 Fed. Reg. 11,253 (1983), are [sic] sufficient. This Court has reviewed these various impact statements, and finds them filled with superficial generalizations, unsupported assertions, cursory dismissals. These documents lack the analysis which is essential to the responsible implementation of a program of this magnitude.

This Court finds as a fact that the defendants have not considered the impact of the 50-cent per hundredweight deduction on the commercial sale of milk.

Each of these factors is relevant to the Secretary's decision to impose this deduction. Returns to dairy farmers, the support levels of other commodities, and

costs of production are made specifically relevant by statutes. The impact is inherently relevant to the entire dairy price support program. Failure to consider any one of these would render the Secretary's decision suspect. Failure to consider all of them renders the Secretary's decision to impose this deduction clearly at odds with the intent of the Congress. The decision to impose this deduction is therefore void. Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 31-32 (1981); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212-14 (1976); Federal Maritime Commission v. Seatrain Lines, Incorporated, 411 U.S. 726, 745-46 (1973); Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 272 (1968); Dixon v. United States,

381 U.S. 68, 74 (1965); Manhattan General Equipment Company v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936); Miller v. United States, 294 U.S. 435, 440 (1935); United States v. Doe, 701 F.2d 819, 823 (9th Cir. 1983); State Farm Mutual Automobile Insurance Company v. Department of Transportation, 680 F.2d 206, 222 (D.C. Cir. 1982); Pacific Gas & Electric Company v. United States, 664 F.2d 1133, 1135 (9th Cir. 1981); Committee for an Independent P-I v. Smith, 549 F. Supp. 985, 989 (W.D. Wash. 1982); Wiggin Brothers, Incorporated v. Department of Energy, 548 F.Supp. 547, 549 (N.D. Tex. 1982); United States v. Firestone Tire & Rubber Company, 518 F.Supp. 1021, 1033 (N.D. Ohio 1981).

Therefore, to summarize the major findings which this Court has made in

this action:

1. The action of the Secretary of Agriculture in imposing the fifty-cent per hundredweight deduction requirement is fully judically reviewable.

2. The defendants have not shown full good-faith compliance with this Court's Order of January 11, 1983.

3. This Court, and not the Secretary, is the proper authority to construe of [sic] § 101 of the Omnibus Budget Reconciliation Act.

4. The defendants have misconstrued the Congressional intent of § 101 of the Omnibus Budget Reconciliation Act in that they have ignored the Congressional mandate to consider cost of production.

5. The defendants have not adequately observed the requirements of

notice and comment rulemaking under 5 U.S.C. § 553 in that they have neither made available to interested persons studies and information necessary for informed comment on the proposed deduction requirement nor shown any consideration of the substantive comments made in response to the proposed determination.

6. The defendants have not considered factors relevant to the determination: the defendants have failed to consider returns to producers; the defendants have failed to consider the potential impact of other price support programs, including but not limited to the Payment-in-Kind program; the defendants have failed to consider the cost of production in the dairy industry; the defendants have failed to consider the impact of this program.

In view of these findings, and the various additional factors discussed in this opinion, this Court concludes that the defendant Secretary of Agriculture has failed to comply with the mandatory requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. Therefore, under 5 U.S.C. § 706(2), the defendants' action in imposing the Determination announced March 17, 1983 must be and hereby is held unlawful and set aside.

IX

POTENTIAL IRREPARABLE INJURY TO PLAINTIFFS

In discussing the possibility of harm to the plaintiffs, the defendants have continually insisted that the only possible harm to the plaintiffs is a loss

of income, which the government stands ready to repay.

In the January Order, this Court discussed the potential consequences which this Court perceived would follow from this deduction.

> While the authorities on which the defendants rely in this regard are all well reasoned, I find that they are inapplicable because the possible injury which confronts the plaintiffs goes beyond a loss of income. As the evidence in this case whose, modern farming is a business involving highly sophisticated financial arrangements. Each of the five dairy farmers who testified before this Court stated that he was under a heavy burden of debt. Periodic refinancing is an experience which each of these men face, as do each of the six

dairy farmers whose affidavits have been submitted to this Court. Doubtlessly, there are few farmers in this nation who could operate their farms without credit arrangements.

Those farmers who have testified in Court have indicated emphatically that the daring [sic] on their cash flow which will follow from the imposition of the Secretary's fifty cents per hudredweight deduction will cause more than a loss of income. For many it will require refinancing arrangements, the forced sale of non-liquid assets, and quite possible bankruptcy. This same situation is shown by the affidavits of the individual farmers and by those of the various officers of dairy cooperatives and other marketing associations which have been filed with this Court.

* * *

The evidentiary materials which the Court has received present many . . . examples of persons in the dairy farming industry who report that the Secretary's deduction requirement will force them out of business if it is not enjoined. Nor is the Court unaware of the general state of dairy farming in the nation as a whole. These are very bleak economic times for these people.

The defendants have pointed out that many of the witnesses who have testified are persons who report substantial net worth. Based on an examination of the financial statements of the dairy farmers who have appeared as witnesses for the plaintiffs, the Court does not disagree. Net worth, however, is an inadequate measure for determining

the likely impact of the Secretary's deduction. The bulk of the assets which make up the farmers' net worth are nonliquid. Further, given the depressed state of the general economy, for these farmers to liquidate large blocks of their assets in order to meet the immediate demands of the Secretary's deduction would be a very costly matter. It would probably produce case returns far below the stated "paper" value of their capital assets.

Further, given the necessity of on-going financing mentioned above, the results of the deduction will doubtlessly include a tightening of the credit arrangements which these farmers must maintain. Aware of the Secretary of Agriculture's intention to impose the deduction of fifty cent per hundredweight and of the

drain on farmers' cash flow which this deduction will cause, investors will doubtlessly adjust their credit terms with farmers. Given the tight credit situations which many dairy farmers already face, such an anticipatory adjustment in credit could have sweeping and precipitous consequences.

Based on a careful consideration of the evidence which has been presented, this Court cannot accept the defendants' contention that the likely harm which the plaintiffs face from the deduction requirement is limited to a loss of income.

This Court finds that the imposition of the fifty cents per hundredweight deduction will have the likely effect of placing severe and immediate strains on dairy farmers' cash flow situations. The

Court further finds that the imposition of the deductions will have the likely effect of forcing dairy farmers to liquidate capital assets under forced and disadvantageous circumstances. The Court further finds that the imposition of the deduction will have the likely effect of causing creditors to tighten their credit arrangements with dairy farmers. From the evidence and from the above-stated facts, this Court finds that the imposition of this assessment will have the likely effect of forcing many dairy farmers out of business. Fed [sic] R. Civ. P. 52.

These are injuries which go beyond those which will be compensated by the refunding of the deduction which the defendants seek to collect from the dairy farmers. They are of a sort

which may well be incalculable, and they are of a sort which will not be recompensated through awards of money damages, even assuming that such awards are as a practical matter tical matter available. Particularly in view of the very strong showing that the plaintiffs have made with respect to the merits of this controversy, they are of the sort which courts have found to be irreparable and warranting injunctive relief to maintain the status quo ante pendente litum. Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495 (4th Cir. 1981); Blackwelder Furniture Company, supra, 550 F.2d at 196-97; New York Pathological and X-Ray Laboratories, Inc. v. Immigration and Naturalization Service, 523 F.2d 79 (2d Cir. 1975); International Controls Corporation v. Vesco, 490 F.2d

1334, 1344 (2d Cir. 1974); Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197, 1205 (2d Cir. 1970); Amoco Oil Company v. Zarb, 402 F. Supp. 1001 (D.D.C. 1975); Assaf v. University of Texas System, 399 F. Supp. 1245, 1251 (S.D. Tex. 1975); American Federation of Government Employees, Local 1858 v. Callaway, 398 F. Supp. 176, 194-95 (N.D. Ala. 1975); Brennan Petroleum Products Co., Inc. v. Pasco Petroleum Co., Inc., 373 F. Supp. 1312, 1316 (D. Ariz. 1974); Bucks County Cable TV, Inc. v. United States, 299 F. Supp. 1325 (E.D. Penn. 1969).

558 F. Supp. at 1024, 1025-26

The defendants have made no specific response to this portion of the January Order. Rather they contend that because, in their view, there is no possibility

that the plaintiffs will prevail on the merits, the balancing of the relevant factors now renders the plaintiffs' injury inconsequential. This Court disagrees with the defendants' assessment of the merits and with their calculation of the injury.

Clearly, given the overwhelming case on the merits which the plaintiffs had established in the January litigation, they needed to show very little injury. The defendants appear to regard the showing made in January as having been minimal. This Court believe [sic] that showing was quite strong.

This Court also does not overlook the fact that the Department has conducted this rulemaking under the misconception that they had no duty to consider impact, and in fact, have been manifestly

deficient in considering the potential impact of this deduction requirement. The defendants' response has taken the form of superficial, conclusory statements, marked by a failure to analyze impact.

Further, this Court does not regard the defendants' assertion that full review will be completed before there is a change in the status quo as a realistic assessment of the gravity or difficulty of this case.

Finally, the Secretary has indicated that he intends to continue this deduction until he receives substantial concessions of authority from the Congress. Mr. Ahalt concedes a bureaucratic program once established, is quite difficult to remove. See Hearing of April 12-14, tr. 438 (Ahalt). Given the Secretary's

statements, this Court has no doubt that a ruling will for the Secretary would [sic] be regarded as precedent for a continuation of this deduction beyond September.

This Court cannot avoid the conclusion that to give approval of the defendants' action now will fundamentally alter the status quo.

The plaintiffs made a substantial showing in the January hearing, and have augmented that showing in the hearing of April 12-14. In view of the defendants' failure to rebut the plaintiffs' showing of possibly irreparable injury; in view of the defendants' failure to adequately consider the impact of the program; and in view of the strength of the plaintiffs' showing with respect to the merits in this litigation, this Court finds the

the balance of interest strongly favors issuance of an injunction.

X

INJURY TO THE DEFENDANTS

The defendants claims [sic] that they will be injured if the collection of the deduction is enjoined or delayed in any way. This Court has considered these claims carefully, and finds that they are little more than expansions on the claims which the defendants made to this Court in the January hearing: the sole injury to the defendants is the potential loss of revenues.

In the Order of January 11, this Court specifically rejected this position for the following reasons: it assumes that the defendants have established a legal right to the monies in question,

and it assumes that the harm the defendants will suffer from an injunction of this deduction is comparable to the harm to the plaintiffs from allowing it.

In this litigation, the defendants have tried to answer the first contention, by arguing that they have now corrected any legal flaws in the Secretary's rulemaking procedure. At this opinion make clear, the Secretary's action in the current rulemaking is not sufficiently free of legal errors to meet the requirements of the Administrative Procedure Act.

As to the second assumption, that the harm to the defendants is comparable to that which the plaintiffs may suffer, the defendants remain silent. The defendants have not addressed in any way the possibility that the impact of this

deduction might be far more severe than the impact of delaying it until the serious questions of the legality of the Secretary's action can be resolved.

In view of this Court's position on the merits, and in view of the substantial failure of the defendants to address the concerns which this Court raised in the Order of January 11, this Court finds that the possible injury to the defendants from the enjoining of this program is not sufficient to warrant any stay in the issuance of the injunction to which the plaintiffs have shown themselves legally entitled.

XI

THE PUBLIC INTEREST

Throughout this litigation, the defendants have defined the public inter-

est exclusively in terms of the ostensible savings which this program might generate. As I believe is adequately demonstrated elsewhere in this opinion, this Court finds that the defendants' analysis of this problem is so inadequate that they have not shown that they have genuinely considered what the probable effects of this program will be.

Further, this Court regards the public interest as reaching beyond the possible 25-cent per citizen per month savings that this program might generate. The public has a real and emphatic interest in seeing that the law is upheld.

This Court commented on the defendants' identification of their interest in collecting revenue with the public interest in the Order of January 11. The defendants have not responded to

this point; they have merely repeated this identity.

This Court did not regard its discussion of the public interest in the Order of January 11 as a mere rhetorical gesture. Modern government is an engine controlling the lives of the average citizen to a degree the Founding Fathers might not have imagined. If modern government is to stay faithful to the vision on which this nation is founded, it must remain responsible to and responsive to the principles which have guided this nation throughout its history.

Critical among these is that ours must be a government of laws, and not merely of men. Men, no matter how sincere their views, no matter how high-minded their goals, tend invariably

to shape affairs to their own personal vision. Absent law, there can be no accounting for this vision.

Counsel for the defendants have acknowledged that this principle holds true. Indeed, they assert that the government properly must be held to high legal standards for its conduct. Whatever problems the government confronts, be it a milk surplus or any other, the government must adhere to the law, both in letter and in spirit. I remain firm in the belief that the public interest will be disserved by condoning the Secretary's action where that action falls outside the law, and I am convinced the Secretary's action of March 17, 1983 does fall outside the law.

A second principle must also be kept in mind in considering the public

interest: ours is a government of the people, in which the people must have a voice. I recognize that this is a concept originally voiced during a much earlier time in our country's history, before the rise of modern bureaucratic programs, indeed voiced before the Department of Agriculture was first established in 1862. Time, however, has not undercut the importance of this principle. Indeed, the growth of modern government and the acquisition of continually greater power by governmental entities has made it all the more important.

Ours remains a government of representatives chosen by the people and accountable to them. With respect to this case, the most significant officials are the members of the Congress, who have

enacted the Omnibus Budget Reconciliation Act. These are elected officials, whose constituents can call to account for their actions, however imperfect that accounting process may be. The defendant Secretary of Agriculture, on the other hand, is appointed by the President. He is not directly accountable to the public at large, or to any portion of the electorate. As such, it is fitting and proper that his authority be held in check by the courts. He must be kept within the bounds set down in the statutes enacted by the Congress. It is, after all, the intent of the Congress that the Secretary faithfully adhere [sic] these statutory commands.

In view of these factors, this Court finds that the public interest strongly favors enjoining the collection of the

fifty cent per hundredweight deduction. Fed. R. Civ. P. 52.

XII

CONCLUSION

Reviewing then the four factors which bear on the question of whether a preliminary injunction should issue this Court finds:

1) the plaintiffs have established a very strong likelihood of success on the merits in this case;

2) the plaintiffs have established a strong showing that, unless they are allowed injunctive relief by this Court, they will suffer injuries of a sort which cannot be adequately compensated by a later return of the monies in question;

3) the defendants have failed to show that an injunction will cause them

hardship of a level comparable to the harm that the plaintiffs will suffer if no injunction is issued;

4) the public interest strongly favors an injunction to prohibit the collection of this deduction.

Therefore, an injunction will issue, prohibiting the further collection of this deduction requirement, and ordering forthwith the return of all monies previously collected.

IT IS SO ORDERED.

/s/
MATTHEW J. PERRY
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
June 3, 1983

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 831426

State of South Carolina, et al,

Appellees,

versus

John R. Block, etc., et al,

Appellants.

ORDER

Upon consideration of the appellants' motion for a stay of the district court's 20-day injunctive order pending appeal, the appellees' responses in opposition to the motion, the appellants' reply and the additional letter response of the appellees;

IT IS ORDERED that the motion for a stay pending appeal is granted pending further order of this court.

Entered at the direction of Judge Sprouse with the concurrence of Judge Ervin and Judge Chapman.

For the Court

/s/ William K. Slate, II
CLERK

filed: May 13, 1983

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1426(L)

State of South Carolina, etc., et al,

Appellees,

versus

John R. Block, etc., et al,

Appellants.

No. 83-1511

State of South Carolina, etc., et al,

Appellees,

versus

John R. Block, etc., et al,

Appellants.

Appeals from the United States
District Court for the
District of South Carolina, at Columbia.
Mathew J. Perry, District Judge

Upon consideration of the appellants' motion for stay pending appeal, and the various responses in opposition thereto:

IT IS ORDERED that the motion for stay pending appeal is granted and the above-styled consolidated cases are expedited for briefing and oral argument.

IT IS FURTHER ORDERED that the briefing order of June 8, 1983 is recinded and the following expedited briefing schedule established:

(1) appellants shall serve and file their consolidated brief and joint appendix on or before June 20, 1983;

(2) appellees shall file their consolidated brief on or before June 30, 1983;

(3) appellants' reply brief, if any, shall be served and filed in the office of the clerk on or before July 5, 1983;

(4) oral argument shall be presented at the July term of court (July 11-15) in Wilmington, North Carolina.

Entered at the direction of Judge Sprouse with concurrence of Judge Ervin and Judge Chapman.

For the Court

/s/ William K. Slate, II
CLERK

filed: June 13, 1983

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1426

State of South Carolina, et al,

Appellees,

versus

John R. Block, etc., et al,

Appellants,

State of Minnesota, /Es

Amicus Curiae,

Pensylvania Farmers Union,

Amicus Curiae,

Dairy Farmer Distributors
of America and Gustafson,

Amicus Curiae,

State of New York, et al,

Amicus Curiae,

No. 83-1151

State of South Carolina, et al,

Appellees,

versus

John R. Block, etc., et al,

Appellants,

State of Minnesota, /Es

Amicus Curiae,

Pensylvania Farmers Union,

Amicus Curiae,

Dairy Farmer Distributors
of America and Gustafson,

Amicus Curiae,

State of New York, et al,

Amicus Curiae,

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Phillips, Judge Sprouse and Judge Ervin.

For the Court

/s/ William K. Slate, II
CLERK

filed: October 25, 1983

Appendix B

7 U.S.C. § 1446b (§204 of the Agricultural Act of 1949) provides:

The production and use of abundant supplies of high quality milk and dairy products are essential to the health and general welfare of the Nation; a dependable domestic source of supply of these foods in the form of high grade dairy herds and modern, sanitary dairy equipment is important to the national defense; and an economically sound dairy industry affects beneficially the economy of the country as a whole. It is the policy of Congress to assure a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy.

Public Law 97-253
97th Congress

An Act

To provide for reconciliation pursuant to the first concurrent resolution of the budget for fiscal year 1983 (S. Cong. Res. 92, Ninety-Seventh Congress).

Be it enacted by the Senate House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Omnibus Budget Reconciliation Act of 1982".

TITLE I -- AGRICULTURE, FORESTRY, AND RELATED PROGRAMS

Subtitle A -- Dairy Price Support Program

SEC. 101. Section 201 of the Agricultural Act of 1949, as amended by the Agriculture and Food Act of 1981, is amended by --

(1) effective October 1, 1982, striking out everything in subsection (c) after the first sentence and preceding the sentence

which begins "Such price support shall be provided";

(2) adding a new subsection (d) as follows:
"(d) Notwithstanding any other provision of law --

"(1)(A) Effective for the period beginning October 1, 1982, and ending September 30, 1984, the price of milk shall be supported at not less than $13.10 per hundredweight of milk containing 3.67 per centum milkfat.

"(B) Effective for the fiscal year beginning October 1, 1984, the price of milk shall be supported at not less than such level that represents the percentage of parity that the Secretary determines $13.10 represented as of October 1, 1983.

"(C) The price of milk shall be supported through the purchase of milk and the products of milk.

"(2) Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price support program. Authority for requiring such deductions shall

not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should estimate that such net price support purchases during that fiscal year would be less than 5 billion pounds, the authority for requiring such deduction shall not apply for the balance of the year.

"(3)(A) Effective for the period beginning April 1, 1983, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight, in addition to the deduction referred to in paragraph (2), from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Corporation. The deduction authorized by this subparagraph shall be implemented only if the Secretary establishes a program whereby the funds resulting from such deductions would be refunded in the manner provided in this paragraph to producers who reduce their commercial marketings from such marketings during the base period. For the purpose of this paragraph, the based period shall be the fiscal year beginning October 1, 1981, or at the option of the Secretary, the average of the two fiscal years beginning October 1, 1980. The Secretary may make such adjust-

ments in individual bases under this subparagraph as the Secretary determines necessary to correct for abnormal factors affecting production and to reflect such other factors as the Secretary determines should be considered in determining a fair and equitable base.

"(B) Refunds under this paragraph shall be based on reductions in commercial marketings as specified by the Secretary, but the Secretary may not require as a condition for making a refund of the entire amount collected from a producer that the producer reduce marketings in excess of a reduction equivalent to the ratio that the total amount of surplus milk production, as estimated by the Secretary for the fiscal year, bears to the total milk production estimated for such period. The Secretary may provide for refunds to be made of amounts collected from producers on a pro rata basis taking into consideration the reduction in commercial marketings by the producer from the commercial marketings during the base period.

"(C) The funds remitted to the Corporation as a result of the deductions provided for under this paragraph that are not used in making refunds to producers shall be used to offset the cost of the milk price support program. Authority for making deductions under this

paragraph shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 7.5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should establish that such net price support purchases during that fiscal year would be less than 7.5 billion pounds, the authority for requiring such deductions shall not apply for the balance of the year.

"(D) The Secretary may provide for refunds to producers on a periodic basis during the year. If, based on total marketings for the year, the Secretary should determine that an overpayment has been made to the producer for the year, the producer shall repay the amount of the overpayment.

"(E) Prior to approving any application for a refund, the Secretary shall require evidence that such reduction in marketings has taken place and that such reduction is a net decrease in marketings of milk and has not been offset by expansion of production in other production facilities in which the person has an interest or by transfer of partial interest in the production facility or by the taking of any other action which is a scheme or device to qualify for payment.

"(4) The funds represented by the deductions referred to in paragraphs (2) and (3) shall be remitted to the Commodity Credit Corporation at such time and such manner as prescribed by the Secretary by each person making payment to a producer of milk purchased from the producer, except that in the case of any producer who markets milk of the producer's own production directly to consumers, such funds shall be remitted to the Corporation by the producer. The funds represented by such reduction shall be considered as included in the payments to a producer of milk for purposes of the minimum price provisions of the Agricultural Adjustment Act of 1933, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

"(5) Each producer who markets milk and each person required to make payment to the Corporation under this subsection shall keep such records and make such reports, in such manner, as the Secretary determines necessary to carry out this subsection. The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this subsection or to determine whether any person subject to the provisions of this subsection has engaged or is engaged or is about to engage in any act or practice that constitutes or will constitute a violation of any

provision of this subsection or regulation issued under this subsection. For the purpose of such investigation, the Secretary is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, and documents that are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and such court may issue an order requiring such person to appear before the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever such person may be found.

"(6)(A) The district courts of the United States are vested with

jurisdiction specifically to enforce, and to prevent and restrain any person from violating any provision of this subsection or any regulation issued under this subsection. Any such civil action authorized to be brought under this subsection shall be referred to the Attorney General for appropriate action. Nothing in this subsection may be construed as requiring the Secretary to refer to the Attorney General minor violations of this subsection whenever the Secretary believes that the administration and enforcement of this subsection would be adequately served by suitable written notice or warning to any person committing such violation.

"(B) Any person who willfully violates any provision of this subsection or any regulation issued under this subsection, or who willfully fails or refuses to remit any amounts due thereunder shall be liable, in addition to payment of the full amount due plus interest, for a civil penalty (to be assessed by the Secretary) of not more than $1,000 for each such violation which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

"(C) The remedies provided in subparagraphs (A) and (B) shall be in addition to, and not exclusive of, remedies otherwise provided at law or in equity.

"(7) In carrying out this subsection, the Secretary may, on a reimbursable or nonreimbursable basis, as the Secretary deems appropriate, use --

"(A) administrators of Federal milk marketing orders;

"(B) State and county committees established under section 8 of the Soil Conservation and Domestic Allotment Act; or

"(C) administrators of State milk marketing programs."

Subtitle B -- Donation of Dairy Products

SEC. 110. Section 416 of the Agricultural Act of 1949 (7 U.S.C. 1431) is amended by adding at the end thereof the following: "Notwithstanding any other provision of law, such dairy products may be donated for distribution to needy households in the United States and to meet the needs of persons receiving nutrition assistance under the Older Americans Act of 1965. Such dairy products may also be donated through foreign governments and public and nonprofit private humanitarian organizations for the assistance of needy persons outside the United States, and the Commodity Credit Corporation may pay, with respect to commodities so donated, reprocessing, packaging, transporting, handling, and other charges, including the cost of

overseas delivery. In order to assure that any such donations for use outside the United States are coordinated with and complement other United States foreign assistance, such donations shall be coordinated through the mechanism designated by the President to coordinate assistance under the Agricultural Trade Development and Assistance Act of 1954 and shall be in addition to the level of assistance programmed under that Act."

7 U.S.C. § 1446 (§ 201 of the Agricultural Act of 1949) (as amended by the Omnibus Budget Reconciliation Act of 1982) provides:

Price Support Levels For Designated Nonbasic Agricultural Commodities. The Secretary is authorized and directed to make available (without regard to the provisions of title III [7 USCS §§ 1447 et seq.]) price support to producers for tung nuts, soybeans, honey, milk, sugar beets, and sugarcane as follows:

(a), (b) [Unchanged]

(c) The price of milk shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. Such price support shall be provided through the purchase of milk and the products of milk.

(d) Notwithstanding any other provision of law --

(1) (A) Effective for the period beginning October 1, 1982, and ending September 30, 1984, the price of milk shall be supported at not less than $13.10 per

hundredweight of milk containing 3.67 per centum milkfat.

(B) Effective for the fiscal year beginning October 1, 1984, the price of milk shall be supported at not less than such level that represents the percentage of parity that the Secretary determines $13.10 represented as of October 1, 1983.

(C) The price of milk shall be supported through the purchase of milk and the products of milk.

(2) Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price support program. Authority for requiring such deductions shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should estimate that such net price support purchases during that fiscal year would be less than 5 billion pounds, the authority for

requiring such deduction shall not apply for the balance of the year.

(3) (A) Effective for the period beginning April 1, 1983, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight, in addition to the deduction referred to in paragraph (2), from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Corporation. The deduction authorized by this subparagraph shall be implemented only if the Secretary establishes a program whereby the funds resulting from such deductions would be refunded in the manner provided in this paragraph to producers who reduce their commercial marketings from such marketings during the base period. For the purpose of this paragraph, the based period shall be the fiscal year beginning October 1, 1981, or at the option of the Secretary, the average of the two fiscal years beginning October 1, 1980. The Secretary may make such adjustments in individual bases under this subparagraph as the Secretary determines necessary to correct for abnormal factors affecting production and to reflect such other factors as the Secretary

determines should be considered in determining a fair and equitable base.

(B) Refunds under this paragraph shall be based on reductions in commercial marketings as specified by the Secretary, but the Secretary may not require as a condition for making a refund of the entire amount collected from a producer that the Producer reduce marketings in excess of a reduction equivalent to the ratio that the total amount of surplus milk production, as estimated by the Secretary for the fiscal year, bears to the total milk production estimated for such period. The Secretary may provide for refunds to be made of amounts collected from producers on a pro rata basis taking into consideration the reduction in commercial marketings by the producer from the commercial marketings during the base period.

(C) The funds remitted to the Corporation as a result of the deductions provided for under this paragraph that are not used in making refunds to producers shall be used to offset the cost of the milk price support program. Authority for making deductions under this paragraph shall not

apply for any fiscal year for which the secretary estimates that net price support purchases of milk or the products of milk would be less than 7.5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should establish that such net price support purchases during that fiscal year would be less than 7.5 billion pounds, the authority for requiring such deductions shall not apply for the balance of the year.

(D) The Secretary may provide for refunds to producers on a periodic basis during the year. If, based on total marketings for the year, the Secretary should determine that an overpayment has been made to the producer for the year, the producer shall repay the amount of the overpayment.

(E) Prior to approving any application for a refund, the Secretary shall require evidence that such reduction in marketings has taken place and that such reduction is a net decrease in marketings of milk and has not been offset by expansion of production in other production facilities in which the person has an interest or by transfer of partial

interest in the production facility or by the taking of any other action which is a scheme or device to qualify for payment.

(4) The funds represented by the deductions referred to in paragraphs (2) and (3) shall be remitted to the Commodity Credit Corporation at such time and such manner as prescribed by the Secretary by each person making payment to a producer for milk purchased from the producer, except that in the case of any producer who markets milk of the producer's own production directly to consumers, such funds shall be remitted to the Corporation by the producer. The funds represented by such reduction shall be considered as included in the payments to a producer of milk for purposes of the minimum price provisions of the Agricultural Adjustment Act of 1933, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

(5) Each producer who markets milk and each person required to make payment to the Corporation under this subsection shall keep such records and make such reports, in such manner, as the Secretary determines necessary to carry out this subsection. The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this subsection or

to determine whether any person subject to the provisions of this subsection has engaged or is engaged or is about to engage in any act or practice that constitutes or will constitute a violation of any provision of this subsection or regulation issued under this subsection. For the purpose of such investigation, the Secretary is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, and documents that are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and such court may issue an order requiring such person to appear before the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in

the judicial district whereof such person is an inhabitant or wherever such person may be found.

(6) (A) The district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any provision of this subsection or any regulation issued under this subsection. Any such civil action authorized to be brought under this subsection shall be referred to the Attorney General for appropriate action. Nothing in this subsection may be construed as requiring the Secretary to refer to the Attorney General minor violations of this subsection whenever the Secretary believes that the administration and enforcement of this subsection would be adequately served by suitable written notice or warning to any person committing such violation.

(B) Any person who willfully violates any provision of this subsection or any regulation issued under this subsection, or who willfully fails or refuses to remit any amounts due thereunder shall be liable, in addition to payment of the full amount due plus interest, for a civil penalty (to be assessed by the Secretary) of not more than $1,000 for each such violation which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

(C) The remedies provided in subparagraphs (A) and (B) shall be in addition to, and not exclusive of, remedies otherwise provided at law or in equity.

(7) In carrying out this subsection, the Secretary may, on a reimbursable or non-reimbursable basis, as the Secretary deems appropriate, use--

(A) administrators of Federal milk marketing orders;

(B) State and county committees established under section 8 of the Soil Conservation and Domestic Allotment Act [16 USCS § 590h]; or

(C) administrators of State milk marketing programs.

5 U.S.C. § 553, Administrative Procedure Act,provides:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [5 USCS §§ 556 and 557] apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706, Administrative Procedure Act, provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 603, Regulatory Flexibility Act, provides:

(a) Whenever an agency is required by section 553 of this title [5 USCS § 553], or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration.

(b) Each initial regulatory flexibility analysis required under this section shall contain--

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as--

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

5 U.S.C. § 604, Regulatory Flexibility Act, provides:

(a) When an agency promulgates a final rule under section 553 of this title [5 USCS § 553], after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

(1) a succinct statement of the need for, and the objectives of, the rule;

(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and

(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

(b) The agency shall make copies of the final regulatory flexibility analysis

available to members of the public and shall publish in the Federal Register at the time of publication of the final rule under section 553 of this title [5 USCS § 553] a statement describing how the public may obtain such copies.